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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-522

GIBSON & PERIN CO., et al.,

Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

GIBSON & PERIN CO.
GIBSON & PERIN BUILDING CO.
THE GILSEY SHOE & HANDBAG CO., INC.
J. & L. REALTY
JOSEPH KARP
GILBERT KARP, d.b.a. Main Auction Galleries
KOCH EMBROIDERY & PLEATING SHOP, INC.
LOWENTHAL'S, INC.
ROEPER, HANSON, NEWMAN CO.
PIGALL'S FRENCH RESTAURANT, INC.
ALDAN COMPANY
NANBIL, INCORPORATED

Petitioners,

vs.

CITY OF CINCINNATI
CINCINNATI REDEVELOPMENT CORP.
ASSOCIATED DRY GOODS CORPORATION

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 26, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported but referred to at 42 L.W. 2033, appears in the Appendix attached hereto, being Appendix pages 1-17. The Memorandum of Opinion of the District Court for the Southern District of Ohio, Western Division, is also not yet reported, and appears in the Appendix pages 18-105. The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit entered on June 26, 1973. This petition was filed within ninety days of that entry and there have been no orders respecting a rehearing nor an extension of time within which to petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. After an Urban Renewal Plan has been adopted and the urban renewal area has been acquired by the City by eminent domain proceedings or the threat thereof, so that there is no longer any private owner of property within the urban renewal area, do the plaintiffs, owning property and businesses abutting the urban renewal area, and who are directly affected economically by reason of the violation of the Urban Renewal Plan by the City and the Redeveloper, have standing to maintain an action in a United States District Court for violations of their constitutional rights to due process and equal protection of the law occasioned thereby?

2. Where the United States District Court finds that the implementation of an Urban Renewal Plan has violated the plaintiffs' rights to due process and equal protection of the laws, does it have authority to issue a mandatory injunction requiring physical changes in an urban renewal structure which it has found to violate the Urban Renewal Plan?

3. Can the City, and private interests contracting with it, be protected by a State doctrine of governmental immunity from action by injured parties for violations of their consti-

tutional rights to due process and equal protection of the law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 5th Amendment to the Constitution of the United States, Amendment 5 U.S.C.A., 4:

> "No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

2. 14th Amendment to the Constitution of the United States, Amendment 14 U.S.C.A., 33:

> "Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article I, Section 1, of the Constitution of the State of Ohio, *Baldwin's Ohio Revised Code Service, Constitution,* page 1:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

4. Article I, Section 16, of the Constitution of the State of Ohio, *Baldwin's Ohio Revised Code Service, Constitution,* page 21:

"All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the State, in such courts and in such manner, as may be provided by law."

5. Article I, Section 19, of the Constitution of the State of Ohio, *Baldwin's Ohio Revised Code Service, Constitution,* page 24:

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money: and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

6. 42 U.S.C. § 1441:

"Congressional declaration of national housing policy

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy

of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid; and (5) governmental assistance for decent, safe, and sanitary farm dwellings and related facilities shall be extended where the farm owner demonstrates that he lacks sufficient resources to provide such housing on his own account and is unable to secure necessary credit for such housing from other sources on terms and conditions which he could reasonably be expected to fulfill. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, con-

struction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction."

July 15, 1949, c. 338, § 2, 63 Stat. 413; May 25, 1967, Pub.L. 90-19, § 6(a), 81 Stat. 21.

7. 42 U.S.C. § 1451(c):

"Requirements; exceptions; minimum standards housing code

(c) No contract shall be entered into for any loan or capital grant under this subchapter, or for annual contributions or capital grants pursuant to the United States Housing Act of 1937, as amended, for any project or projects not constructed or covered by a contract for annual contributions prior to August 1, 1956, and no mortgage shall be insured, and no commitment to insure a mortgage shall be issued, under section 1715k or section 1715*l*(d) (3) of Title 12, unless (1), there is presented to the Secretary by the locality a workable program for community improvement (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment

of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Secretary determines that such program meets the requirements of this subsection and certifies that the Federal assistance may be made available in such community: . . . ."

8. 42 U.S.C. § 1455:

"Requirements for loan- or capital-grant contracts

Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that —

Approval of urban renewal plan

(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole; and (iv) the urban renewal plan gives due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the plan;

Obligations of purchasers, lessees, assignees of property, and Federal agencies

(b) When real property acquired or held by the local public agency in connection with the project is sold or

leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Secretary finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this subchapter: *Provided,* That clause (ii) of this subsection shall not apply to mortgagees and others who acquire an interest in such property as the result of the enforcement of any lien or claim thereon: *And provided further,* That, with respect to any improvements of a type which it is otherwise authorized to undertake, any Federal agency (as defined in section 472(b) of Title 40, and also including the District of Columbia or any agency thereof) is authorized to become obligated in accordance with this subsection, except that clause (ii) of this subsection shall apply to such Federal agency only to the extent that it is authorized (and funds have been made available) to make the improvements involved;

• • •

Acquisition of land; public hearings

(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

Public disclosure by redevelopers

(e) No understanding with respect to, or contract for, the disposition of land within an urban renewal area shall be entered into by a local public agency unless the local public agency shall have first made public in such form and manner as may be prescribed by the Secretary, (1) the name of the redeveloper, together with the names of its officers and principal members, shareholders and investors, and other interested parties, (2) the redeveloper's estimate of the cost of any residential redevelopment and rehabilitation, and (3) the redeveloper's estimate of

rentals and sales prices of any proposed housing involved in such redevelopment and rehabilitation: *Provided*, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land."

9. Ohio Revised Code, Section 723.09 (*Baldwin's Ohio Revised Code Service*):

"Notice of the intention of the legislative authority of a municipal corporation to vacate any street, alley, avenue, or part thereof, shall be given as provided in Section 723.07 of the Revised Code except when written consent to such vacation is filed with the legislative authority by the owners of the property abutting the part of the street or alley proposed to be vacated, in which case such notice shall not be required."

10. Ohio Revised Code, Section 723.07 (*Baldwin's Ohio Revised Code Service*):

"No street or alley shall be vacated or narrowed unless notice of the pendency and prayer of the petition under Section 723.04 of the Revised Code is given by publishing, in a newspaper published or of general circulation in such municipal corporation, for six consecutive weeks preceding action on such petition, or, where no newspaper is published in the municipal corporation, by posting the notice in three public places therein six weeks preceding such action. Action thereon shall take place within three months after the completion of the notice."

STATEMENT OF THE CASE

The Complaint in this action was filed by the plaintiffs on June 2, 1966, and after various pretrial procedures, a Third Amended Complaint was filed in January of 1969 charging the defendants with violation of the plaintiffs' constitutional rights and antitrust violations in connection with the construction of a shoppers parking garage constructed as a part of the defendant City's urban renewal program for Block D of

the Central Business District. During June, 1970, a fifteen-day trial was held before the District Court and more than a year later, on July 26, 1971, the Court rendered its Memorandum of Opinion appended hereto. On August 11, 1971, supplemented *nunc pro tunc* by an entry of September 3, 1971, the Court ordered the defendants City of Cincinnati, Associated Dry Goods Corporation and the Cincinnati Redevelopment Corporation to submit a plan for the modification of the garage and to pay plaintiffs' costs, expenses and attorney fees. After submission of a plan which the District Court rejected, the defendants on March 30, 1972, were ordered to submit detailed plans and spectifications within thirty days and to complete the construction of modifications within one year.

Following such order, both plaintiffs and defendants filed Notices of Appeal to the United States Court of Appeals for the Sixth Circuit. In its opinion delivered on June 26, 1973, and appended hereto, the Court held that the plaintiffs did not have standing and that there was no liability on the part of the defendants and, therefore, remanded the case to the District Court for dismissal. Plaintiffs have, therefore, filed this Petition for Certiorari.

Block "D" of the Central Business District Urban Renewal Area of the City of Cincinnati, Ohio, is bounded on the south by Fourth Street, on the west by Elm Street, on the north by Fifth Street and on the east by Race Street.

The plaintiffs are small retail businessmen and landowners located across Fourth Street opposite the south side of Block D. Some had previously been located in Block D and had been forced to move by urban renewal land acquisition.[1] They re-

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[1] The objectives of the Urban Renewal Plan are in part as follows: [Pl. ex. A-3]:

"SECTION C. OBJECTIVES OF THE PROJECT

The general objectives for the development of the Core project shall be as follows:

a. To reverse the trends of decentralization of the Core area functions by inducing the recentralization of these functions.

b. To establish the Core as the regional center for main

located on the south side as a result of assurances by the City that retail businesses would be located on the north side of Fourth Street. In 1964 illustrations prepared by the City showed that the shoppers garage was to be located along the eastern side of Elm Street between 4th and 5th Streets with retail stores on the south side of the Block along Fourth Street and an office tower located at Fourth and Race Streets. In the

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concentration and productive interaction for the following functions:

(1) Government — Management — Financial
(2) Mercantile — Retail — consumer services
(3) Cultural — Entertainment — Social — Education
(4) Regional Headquarters — management and distribution

c. To encourage downtown living as an accepted form of residential existence.

d. To improve the usefulness and desirability of the Core and Core functions by:

(1) Minimizing pedestrian conflicts with vehicles through development of pedestrian islands wherever possible.

(2) Facilitating the movement of vehicular and service traffic within the Core; providing where possible vehicular on lower levels (below grade) with pedestrian circulation at or above grade.

(3) Providing easy and direct vehicular and service access to all Core area buildings through new development of street facilities where possible and the provision of set back lines for future street widening and improvements.

(4) Providing adequate parking as close to destination goal as possible with wherever possible the objective being the selective elemination in time of curb parking spaces with the provisions of new public off street parking facilities.

(5) Providing efficient pedestrian linkages between the Core and complementary uses."

§ D(3)(C)(4)

"Areas D, G, and I

a. The objective here is to redevelop for predominant uses as follows:

1. Areas D and G

Predominant use as retail, parking and motor hotel with additional but not predominant use for office (Note:

spring of 1965, this Block, as well as other urban renewal blocks in the Central Business District, was placed for bid. Defendant Cincinnati Redevelopment Corporation (Redeveloper) was the successful bidder for Block D as well as for Block A. The latter was to be the "show piece" block in the center of the core area with a large piazza, as well as a thirty-two story office tower. Prior to making its bid, the Redeveloper received a commitment from Associated Dry Goods Corporation (Associated) to purchase a shoppers parking garage if it

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It is preferred to treat these two areas as a single entity.) . . .

b. Program of Space and Use
   1. For Areas D and G
      a. Office* — from 160,000 to 240,000 square feet.
      b. Motor hotels — 300 rooms.
      c. Retail — from 180,000 to 220,000 square feet.
      d. Low-rate parking — from 1200 to 1700 cars dependent upon street capacity at site.

      * Tenant parking is provided at one space per 1500 sq. ft. of office space.

c. Basic Organization
   1. Retail continuity is to be retained in the design of Areas D and G with orientation primarily toward Race Street and secondarily toward Fifth Street. . . .

      • • •

   3. The development of office space in Area D shall be oriented to Fourth Street so as to maintain a proper relationship to the general office Core.
   4. The design of Area D shall create the feeling of open space at its northeast corner in order to recognize the coming together of two main streams of pedestrian traffic along Fifth Street and Race Street and also to follow out the theme of a sequence of open spaces on Fifth Street. This open space can be treated through a setback in the design of the areas or alternatively through arcading.

d. Street Widths . . .
   Fourth — 50′ from curb to curb throughout. . . .

e. Pedestrian Circulation
   The design shall recognize the pedestrian movements at grade and on the second level.

f. Truck Service
   1. An underground truck service area shall be provided for the facilities of Area D and Pogues. . . ."

was oriented along Fourth Street and connected to Associated's large department store by a bridge over Race Street. Each other bidder had received a similar offer from Associated. The bid of the Redeveloper was accepted by the City.

During 1965, the plaintiffs believed that the redevelopment of Block D would be as depicted in 1964. However, in February of 1966 a drawing of the proposed garage appeared in Cincinnati newspapers, which revealed that the garage was to be located along the entire north side of Fourth Street and, more importantly, cars would be entering and leaving the garage on "scissors ramps" which extended into the traveled portion of Fourth Street for roughly half the length of the block and not only created a traffic hazard, but also seriously hindered pedestrian sightlines from the north side of the street to the plaintiffs' businesses; and because of an optical illusion, appeared to block the north side of the sidewalk entirely. At that point, certain of the plaintiffs attempted to inspect the plans for the garage but permission was denied by the City's Urban Renewal Department. When they were finally permitted to see the Plans, and discovered that pedestrian access was limited to the east end of the garage on Race Street and that scissors ramps covered much of Fourth Street, they were advised that the design was a *"fait accompli."* Also, in April, 1966, a portion of the north side of Fourth Street was vacated for the purpose of providing room for the scissors ramps and no notice was given to the plaintiffs although they were abutting landowners.

This attempt for relief culminated in a meeting in the end of June, 1966, in which the plaintiffs were led to believe that the land would not be conveyed by the City to the Redeveloper until after the Fourth of July holiday. The plaintiffs filed their action on July 2, 1966, and afterwards learned that the land had been hurriedly conveyed to the Redeveloper on July 1, 1966.

In February, 1967, the plaintiffs' attempt to enjoin the erection of the scissors ramps was denied. After the trial on the merits, the trial court found that the garage, as completed,

exclusively benefited Associated in that the only pedestrian entrance is located in the middle of the Race Street end of the garage and is connected by a bridge across Race Street to Associated's department store; the only pedestrian access to Fourth Street is through an unmarked fire escape which, because of a locked door, does not allow return from the street; the scissors ramps block the view of and are detrimental to the plaintiffs' businesses on the south side of Fourth Street and depress the value of their land; and that the garage, as constructed, violates the Urban Renewal Plan for Block D.

Thus, Associated gained a shoppers garage connected directly to its store at a savings of millions of dollars. The Redeveloper was able to construct a garage which did not incorporate office space or an underground truck terminal required by the Urban Renewal Plan, and which it already had a commitment to sell prior to the beginning of construction. The Redeveloper was relieved from competing with itself by constructing two office buildings at the same time within a few blocks of each other.

The City was at last able to show that something was being done with the barren land which had remained from earlier demolition. The plaintiffs were deliberately excluded from the benefits of these transactions.

The District Court in its finding of facts concluded that "the implementation of the alleged Urban Renewal Plan by said defendants deprived plaintiffs of the equal protection of the laws and due process under the 14th Amendment of the Federal Constitution," by a total of eleven acts, including: (See Appendix, pages 30 to 53) None of these findings were held by the Court of Appeals to be "clearly erroneous."

(1) The favored treatment given by the City to the Redeveloper and Associated.

(2) The change in the location of the garage without the approval of the Working Review Committee of the Central Business District.

(3) The failure to procure a reappraisal of Block D after approving the new garage site.

(4) The refusal to make public the garage plans until after the adoption of ordinances providing for the Fourth Street scissors ramps.

(5) The failure to give notice to plaintiffs of the vacation of Fourth Street as required by Ohio Revised Code, Section 723.07 and .09.

(6) The conveyance of the property to the Redeveloper "almost secretly" after "giving some of the plaintiffs the impression that it would not convey the property before a certain date".

(7) The issuance of a building permit for the construction of the garage to the Redeveloper with full knowledge of plaintiffs' complaints that the design failed to conform to the Urban Design Plan illustrating the Urban Renewal Plan and after this action had been filed.

(8) The approval of the construction plans for the garage which did not conform to the Urban Renewal Plan.

(9) The misleading of the Department of Housing & Urban Development by telling it that the plaintiffs' complaints were going to be alleviated when such was not the case.

(10) The refusal to permit participation by plaintiffs in the design of the garage.

(11) The permitting of "material modifications of the intent and balance of the design of Block "D" without conducting the necessary public hearing and legislative action.

JURISDICTION

Jurisdiction was not contested by the defendants. However, the District Court acquired jurisdiction:

1) Under 28 U.S.C. 1331(a) because the matter in controversy exceeded the sum of $10,000.00 exclusive of costs and interest, and arose under questions of denial of Constitutional Fifth and Fourteenth Amendment rights to due process and equal protection, violation of antitrust statutes 15 U.S.C. Sections 1 and 2, violation of Urban Renewal Statutes 42 U.S.C. Sections 1441 *et seq.*, and

2) Pendent jurisdiction over state causes of action.

The District Court held, "We view as substantial the plaintiffs' federal allegations that in the process of implementing the changes to the Urban Renewal Plan for the south half of Block D, they were denied equal protection of the law and due process. While this may color their claim federal, essentially it is part of the plaintiffs' State cause of action (over which the Court has and accepts pendent jurisdiction). But we concluded that the result would be the same whether the plaintiffs' case is one over which we have pendent jurisdiction or because a federal question is presented • • •." (Appendix, page 72).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DECISION FAILED TO APPLY PROPERLY THIS COURT'S DECISIONS IN DATA PROCESSING SERVICE v. CAMP, 397 U.S. 150 (1970) AND BARLOW v. COLLINS, 397 U.S. 159 (1970).

The whole question of standing has been developed to "assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for

illumination of difficult constitutional questions", *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). A reading of the record of this case indicates that the "concrete adverseness" was certainly present in this case. As Justices White and Brennan wrote in their separate opinion to *Barlow* v. *Collins*, 397 U.S. 159 (1970):

> "in light of *Flast*, standing exists when the plaintiff alleges, . . . that the challenged action has caused him injury in fact, economic or otherwise [(Footnote 5): Thus for purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant's action. Injury in fact has generally been economic in nature but it need not be]. He thus shows that he has the requisite 'personal stake in the outcome' of his suit, *Baker* v. *Carr*, 369 U.S. 186, 204, 7 L.Ed. 2d 663, 678. We may reasonably expect that a person so harmed will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness and pursue the litigation vigorously."

Throughout this discussion it is important to remember that in 1965 and 1966 there was no person located within Block D of the Urban Renewal Area, as the owners and occupants, some of whom are the present plaintiffs, had been forced to move out and the buildings had been razed. It was for that reason that the District Court concluded that "the plaintiffs, are not only the logical parties to make the challenge but they are obviously the only available ones to do so". (Appendix page 73) *See Richardson* v. *U.S.*, 465 F.2d 844 (3rd Cir. en banc 1972)

This Court has laid down the criteria for determining whether or not the plaintiffs have standing in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), which, after holding that "generalizations about standing to sue are largely worthless as such", stated three criteria as follows:

1. Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise (397 U.S. at 152)
2. Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question (397 U.S. at 153)
3. Whether judicial review has been precluded (397 U.S. at 156)

Judge Edwards of the Court of Appeals, in his concurring opinion, agreed that "there is merit to the plaintiffs' claims of economic injury as found by the District Judge", (Appendix, page 17). The record is replete with many pages of testimony from the plaintiffs and their expert witnesses detailing the economic injuries suffered by them from loss of profits or lowering of land values. Certainly, the plaintiffs have passed the first test.

As to the second, it is obvious that the plaintiffs are within the zone of interests to be protected or regulated by the constitutional guarantee in question. To hold that plaintiffs are not within the zone of interests because they are outside the Urban Renewal Area, is an artificial distinction that violates the spirit of the urban renewal statutes which require that an urban renewal plan afford a "maximum opportunity consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise" and that the urban renewal plan "conform to a general plan for the development of the locality as a whole." [42 U.S.C. 1455(a)(iii)]. Thus, Congress did not intend for an urban renewal project to proceed in a vacuum.

The plaintiffs have had their constitutional rights to due process and equal protection of the laws invaded numerous times by the defendants: in the secrecy surrounding the subversion of the Urban Renewal Plan to the exclusive interest of Associated, in the vacation of Fourth Street without notice to

the plaintiffs, in the untrue representations to H.U.D. that negotiations for settlement were proceeding between the defendants and plaintiffs, and other "flagrant" abuses of discretion as found by the District Court (Appendix, page 76).

The third criterion, whether judicial review has been precluded, must also be answered in the plaintiffs' favor. While there was no specific statute granting the plaintiffs the right to petition for judicial relief, at the same time there was no statute preventing such judicial relief, and there is no question but that judicial review is available in the event of unconstitutional action by a governmental body. *City of Worthington* v. *Carkasdon*, 18 Ohio State 2d 222 (1969).

> "There is no presumption against judicial review and in favor of administrative absolutism (see *Abbott Laboratories* v. *Gardner*, 387 U.S. at 136, 140, 18 L.Ed. 2d 681, 686, 87 S. Ct. 1507), unless that purpose is fairly discernable in the statutory scheme cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 88 L.Ed. 6164, S.Ct. 95." *Data Processing Service* v. *Camp*, 397 U.S. at 157 (1970).

Thus, security dealers have standing to challenge regulations regarding banks, *Investment Company* v. *Comptroller*, 401 U.S. 617 (1971). Those outside an area have standing, providing that they allege and prove special injury, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); those outside a political district may file an action against those within, *Baker* v. *Carr*, 369 U.S. 186 (1962); those outside an airport have standing to complain of noisy and low flights, *United States* v. *Causby*, 328 U.S. 256 (1946), and *Gruggs* v. *Allegheny County*, 369 U.S. 84 (1962).

Citing *Berman* v. *Parker*, 348 U.S. 26 (1954), and one of its own decisions, *Woodland Market Realty Company* v. *City of Cleveland*, 426 F.2d 955 (6th Circuit, 1970), the court held that an urban renewal matter was an exercise of legislative function and was not amenable to judicial review. The court then stated:

> "further, in order to have standing, plaintiffs must establish that they have a legal interest to maintain the suit, that the right invaded – '. . . is a legal right, – one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege' [*Tennessee Power Company* v. *TVA*, 306 U.S. 118, 137 (1930)] (Appendix, page 13).

However, this Court held in *Data Processing*:

> "But the existence or non-existence of 'legal interest' is a matter quite distinct from the problem of standing" (397 U.S. at 153, note 1) "the 'legal interest test' goes to the merits. The question of standing is different." (397 U.S. at 153)

Thus, the Court of Appeals for the Sixth Circuit expressly applied a legal interest test which was expressly disapproved by this Court in 1970.

2. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION ON STANDING CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

The Court of Appeals for the Sixth Circuit distinguished *Data Processing* and *Barlow* v. *Collins* on the grounds that they involved the application of the Administrative Procedure Act, while this case did not involve that Act. The court further held that the urban renewal statutes, 42 U.S.C. Section 1450, *et seq.*, did not provide for judicial review and, therefore, none was possible.

Other Circuits have not applied *Data Processing* and *Barlow* so narrowly, and have used such principles in cases where no statute provided for review of governmental action. In *Springfield Television, Incorporated* v. *City of Springfield*, 462 F.2d 21 (1972, 8th Circuit), plaintiffs challenged the validity of a city ordinance granting a television franchise. The Court of Appeals used the criteria of *Data Processing* to grant stand-

ing on the pendent issue of the validity of the enactment of the ordinance. No statute provided for review of the actions of the city in that situation.

In *City of Englewood* v. *City of Los Angeles*, 451 F.2d 1948 (1972, 9th Circuit), standing was granted to the plaintiff who sought relief from noise created in the operation of defendant's airport. The court stated that the fact that the Secretary of Transportation was not a defendant "did not detract from the holdings" in *Data Processing* and *Barlow* with regard to the standing issue in the case.

In *Virgin Islands Hotel Association* v. *Virgin Islands W & P Authority*, 465 F.2d 1272 (1972, 3rd Circuit), the court granted standing to plaintiffs, who sought an injunction to prevent electricity rate increases. Though the court found no specific statute authorizing review, it relied on *Data Processing* criteria to find standing to sue (465 F.2d at 1225).

Thus, there is a direct conflict between the holding in the instant case by the Sixth Circuit and holdings in the three cases cited above in three other Circuits, as well as a conflict within the Sixth Circuit itself by virtue of the fact that one concurring member of the court specifically found that the plaintiffs had standing.

3. THE COURT OF APPEALS DECIDED THE STATE QUESTIONS OF NOTICE OF VACATION AND GOVERNMENTAL IMMUNITY IN CONFLICT WITH APPLICABLE LAW OF THE STATE OF OHIO.

The Court of Appeals made two decisions of State law in its opinion, both of which conflict with applicable decisions of State of Ohio courts.

The first was a holding (Appendix, pages 13 and 14) that the plaintiffs were not entitled to notice of vacation of the north side of Fourth Street. Ohio statutes require that abutting landowners be given notice of a proposed vacation (O.R.C. Section 723.07, .09). However, the City conducted the vaca-

tion secretly without notice to the plaintiffs. The vacation was for the purpose of putting in the scissors ramps and would have constituted the first notice to the plaintiffs of the change in the design of the garage.

The sole case relied on by the Court of Appeals in approving this maneuver was *State ex rel. Merritt* v. *Linzell*, 163 Ohio State 97, 126 N.E.2d 53 (1955). *Merritt* v. *Linzell* is completely distinguishable from the instant case and in no way is the opinion in *Merritt* applicable under the circumstances, as there was no impairment to the use of the highway upon which Merritt's property abutted, but only the opening up of a completely new highway relocated so as to divert the public travel from the old highway. In the instant case the portion of the street vacated was directly across the street from property owned by The Gibson & Perin Building Company and property occupied by the Gibson & Perin Company, Pigall's and Lowenthals, Inc. The weight of authority, not only in Ohio but throughout the United States, is that the vested interest of an abutting property owner in a street is in the full width of the street in front of his land. *State ex rel. McKay* v. *Kauer*, 156 Ohio State 347, 102 N.E. 2d 703 (1951), *Cincinnati* v. *Batsche*, 52 Ohio State 324, 40 N.E. 21 (1895). The former case cites an important Washington Supreme Court decision which is "on all fours" with our case, and is reported as *Fry* v. *O'Leary*, 141 Wash. 465, 252 Pac. 111, and 49 A.L.R. 1249.

It is admitted by the defendants that no notice of the vacation of a portion of Fourth Street was given, which clearly deprived the plaintiffs of due process and equal protection of the laws under the 14th Amendment.

The significance of the lack of notice is not just in the taking of the street itself, but had notice been given by the City to the owners, this litigation might have been avoided, as the proposed violations of the Urban Renewal Plan would have been brought to the attention of City Council before they occurred.

The second misapplication of State law was the ruling that the City was protected by a State doctrine of governmental immunity. (Appendix, page 14)

Municipal corporations are liable in Ohio for unconstitutional actions. Both the 5th Amendment to the Federal Constitution as applied to the State through the 14th Amendment, and Article I, Section 19, of the Ohio Constitution provide liability for the taking of private land without compensation. In *Wilson* v. *City of Cincinnati*, 172 Ohio State 303, 175 N.E.2d 725 (1961), the Court held the City liable to suit for "what is basically a trespass". The Court reiterated a long-standing legal principle that when property was taken either completely or *pro tanto* by a city, the property owner could institute an action against such city to have his damages assessed by a jury. Similar principles were stated in *City of Worthington* v. *Carskadon*, 18 Ohio State 2d 222 (1969), in which an injunction was issued against a city and *City of Mansfield* v. *Balliett*, 65 Ohio State 451, 63 N.E. 86 (1902), in which the Court held that the city was liable for damage created by water flowing from the city's sewer onto the plaintiff's land. The Court stated, "When in lawful exercise of these powers, private property must be injured for the common benefit of all, all should be held liable to make reparation" (65 O.S., at 478).

Thus, the law of Ohio recognizes the right of a person deprived of his constitutional rights by a municipality to judicial review and relief. Otherwise, the City of Cincinnati could violate a person's constitutionally granted rights without being amenable to suit. The Court of Appeals has in this case placed the City of Cincinnati above the federal and Ohio constitutions.

Further, the Court of Appeals classed the action of the City in implementing urban renewal as a "governmental" as opposed to a "proprietary" function and, therefore, the City could not be held liable for the performance of such acts. In *Wooster* v. *Arbenz*, 116 Ohio State 281, 156 N.E. 210 (1927), the Court held at page 283, "The Court is equally committed to

the doctrine that if the function being exercised is proprietary, and in pursuit of private and corporate duties for the particular benefit of the corporation and its inhabitants, as distinguished from those things in which the whole state has an interest, the city is liable", and continuing on page 284:

> "in performing those duties which are imposed upon the state as obligations of sovereignty such as protection from crime, fires or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becames an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them; but it does, in fact, do so for the comfort and convenience of its citizens for which the city is directly compensated by levying assessments upon property or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary."

The test has been clearly drawn by the Ohio Supreme Court and to characterize a privately owned shoppers' parking garage as a governmental function under the police power of the state is to misapply the criteria of *Wooster* v. *Arbenz*.

In *Sears* v. *City of Cincinnati*, 31 Ohio State 2d 157, 285 N.E. 2d 736 (1972), the court held that a city-owned hospital was providing a service not essential to municipal government and, therefore, there was no reason for granting the city governmental immunity from tort. Even such a salutory endeavor as the operation of a municipal hospital, which may be of benefit to citizens of the community, is not a governmental function.

The tests as laid down in *Wooster* v. *Arbenz* must be applied to the City:

Urban renewal is probably of benefit to the citizens of the City of Cincinnati generally but not of benefit to the State generally. The operation of urban renewal in Cincinnati is designed to attract business and industry to the center of the core area which would otherwise have located in other portions of the State. There are thirty-seven other municipal units besides the City of Cincinnati located within Hamilton County alone, some of which have started competing urban renewal projects. Each municipality would like to have business and industry attracted to raise its tax base.

There is no duty upon the City to participate in urban renewal activities.

The Court of Appeals found that the actions of the other defendants were protected by the fact that they were approved by the City and they could also not be liable. Once the City's immunity is stripped from it, that protection is also stripped from the other defendants and they are equally liable.

4. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The opinion rendered by the Court of Appeals for the Sixth Circuit is replete with factual errors, sarcastic remarks and implicit disagreements with the findings of fact rendered by the District Court.

The tone of the opinion was set (on Appendix, page 3) in the Court's recitation of issues raised by the plaintiffs. The Court of Appeals referred to plaintiffs' complaint in a derogatory fashion by stating that plaintiffs charged defendants with "• • • everything else that they could think of • • •," as though the plaintiffs were burdening the Court by complying with Rule 8(e)(2) Federal Rules of Civil Procedure, which provides that a "party may also state as many separate

claims or defenses as he has regardless of consistency and whether based on legal, equitable or maritime grounds * * *."

Section Three of the Opinion refers to plaintiffs' complaints and pointed out where they were wrong. (Appendix, page 15) Actually, the "plaintiffs' complaints" that the Court refers to are the findings of fact of the District Court. Although these findings of fact are criticized and contradicted by the Court of Appeals, at no point does it hold that the District Court's findings were "clearly erroneous" (Federal Rules of Civil Procedure, Rule 52). Another glaring error contained in that section is the remark that the plaintiffs were tardy in filing their suit a year after the property was conveyed to the redeveloper. This error is repeated in footnote 1 of the Court's opinion (Appendix, page 3). In actual fact, as revealed by the record as presented to the Court of Appeals, suit was filed one day after the property was conveyed to the redeveloper and after the plaintiffs had been led to believe that conveyance would be held up for several days. The title insurance policy issued to the redeveloper specifically excepts the plaintiffs' complaints from coverage. (Plaintiffs' Exhibit E-30).

In other portions of the opinion the Court of Appeals apparently disputes the District Court findings on the function of the scissors ramps (Appendix, page 3), on the distance that plaintiffs' customers would have to walk to use the elevators (Appendix, page 4), on the approval of the design by the City [City Council, acting as the governing body of the locality, did not approve the plans, 42 U.S.C. 1455(a)] (Appendix, page 6), the statement that the plaintiffs, who were located outside the urban renewal area were not within the zone of interest protected by the statute since they had no money invested in the structures located in the urban renewal area and, thus, had no personal interest or stake in the project (Appendix, page 9), and the question on whether a public hearing was required when the design and location of the garage did not conform to the Urban Renewal Plan (Appendix, page 15). These findings were disputed without holding that they were "clearly erroneous".

Furthermore, the Court of Appeals characterized the plaintiffs' antitrust contentions as "ridiculous" and "frivolous" (Appendix, pages 15, 16) while the trial court found them to be "not insubstantial". (Appendix, page 77).

CONCLUSION

There has been no review by this honorable court of the application of Urban Renewal legislation since this court's decision upholding the constitutionality of the Federal Urban Renewal Laws in *Berman* v. *Parker*, 348 U.S. 26, (1954). The Court of Appeals held that the reason no review was provided by statute of acts of agencies and private developers of Urban Renewal projects was "because review would frustrate implementation of Urban Renewal plans and would discourage cities and redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project." (Appendix, page 8). We submit there is no place in our law for the proposition that the end justifies the means, that protracted litigation to correct unconstitutional or unlawful actions should be outlawed because it may discourage redevelopment, regardless of whether accomplished within the provisions of the Constitution and the law.

Moreover, it is important to remember that Urban Renewal was not created to give a city and redeveloper a windfall through the use of federal power and taxpayers' money, but was designed to benefit the community as a whole. The plaintiffs are the members of that community as a whole and are directly affected by the Urban Renewal project which stops literally at their doorsteps. In fact, the Treasurer for Associated's Department Store in Cincinnati testified that without Urban Renewal, he would never have been able to put together the package of land to build this garage. (Testimony of Aubrey, record page 2636). The plaintiffs, who are adversely affected by this flagrant abuse of power, should not be barred from seeking review and a remedy for the violation

of their constitutional rights. The plaintiffs are not attacking the concept of Urban Renewal and agree that the concept as expressed in the statutes is laudatory. What the plaintiffs are objecting to is the use of this power which resulted in unfair benefit to two private interests at the expense of the community at large as well as the plaintiffs.

Finally, the Court of Appeals completely misunderstood the District Court when the latter stated that "the city could not have condemned the property in the south half of Block D for the purpose of erecting a garage such as the one the developer built to the specifications of Pogue's . . ." (Appendix, page 9). The District Court was relying on a previous decision of the Common Pleas Court of Hamilton County, Ohio, involving Block J of the very same Central Business District Urban Renewal which decision had not been appealed. That Court stated:

> "Authorities seem to establish the proposition that when private property is sought to be taken for public use, it must be clearly established that it will be so used. Such use should not be subject to the whims of government after the property is acquired." *City of Cincinnati* v. *Edith C. Bowman, et al.;* Schneider, J. #A217568, 2/8/59 (Appendix, page 87).

In both cases, an Urban Renewal plan had been adopted by City Council but in both cases, the City, in the implementation of the plan, was attempting to change the plan without holding the necessary public hearings and legislative action.

Obviously, if the Urban Renewal Plan, adopted after public hearings and legislative action by the City Council as "the governing body" of Cincinnati, had provided for the construction of a garage to Pogue's specifications, then the City and Redeveloper would have been afforded the protection of *Berman* v. *Parker*. *Berman* v. *Parker* upheld the constitutional basis of Urban Renewal legislation by recognizing that in the statutory scheme, the public interest was protected by the public's participation in the adoption of the Urban Renewal

Plan through its "governing body". Such public interest is not protected when after the adoption of the Urban Renewal Plan it is materially changed without approval of the governing body, by those administering the Plan.

This case is representative of a serious and continuing problem in the redevelopment of other cities and for the foregoing reasons, we respectfully submit our Petition for Certiorari should be granted.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-522

GIBSON & PERIN CO., et al.,
Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,
Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 72-1607,-1608

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GIBSON & PERIN CO., ET AL.,
Plaintiffs-Appellees and Cross-Appellants,
v.
CITY OF CINCINNATI, ET AL.,
Defendants-Appellants and Cross-Appellees.

APPEAL from United States District Court, for the Southern District of Ohio, Western Division.

Decided and Filed June 26, 1973.

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. The controversy in this case arose out of the Cincinnati Business District Core Project Urban Renewal Plan, hereinafter referred to as "Plan", which Plan was adopted by ordinance passed by City Council in 1962 after two public hearings. The Plan was amended in 1964 and 1965. Under this Plan old, dilapidated business buildings in blighted areas of Cincinnati have been razed and replaced with fine, new, privately-owned buildings, with the help of private industry. We agree with the District Judge that urban renewal in Cincinnati has been an outstanding success and a real boon to the City.

Of the many new buildings that have been constructed under the Plan, only the one in issue here has been questioned, and that is Pogue's seven-story, shoppers' parking garage, which opened on June 1, 1967. Although it was characterized by the District Court as a single-purpose parking garage designed

primarily to serve Pogue's department store, actually it serves not only shoppers at Pogue's and other department stores, but also it serves customers for other business places in that downtown area. It serves also people who are attending other evening functions in the area of the garage. The fact is that the garage is open to the general public twenty-four hours a day, seven days a week. It accommodates at least 1,200 cars, which is about four times more parking space than was previously available in the area, and really consists of two garages. It also has space for retail businesses on the ground floor, part of which already has been rented to Closson's.

The plaintiffs are retail merchants and the owner of a French restaurant, all with places of business owned or leased on the south side of Fourth Street (but outside the Urban Renewal Area), and located on the opposite side of Fourth Street from Pogue's parking garage. They do not like the design and location of the parking garage.

Plaintiffs claim, and the District Court found, that plaintiffs,—

> ". . . were led to expect that the north side of Fourth Street would be developed for retail and office space, with a shopper's garage on Elm Street between Fourth and Fifth Streets;"

that instead, the City —

> ". . . not only approved the construction of the garage on Fourth Street between Elm and Race, but approved a single-purpose shopper's garage with scissors ramps designed solely for Pogue's whose store is east of Block D at the corner of Fourth and Race Streets . . . .";

that the change in the Plan was made without a public hearing; that a portion of Fourth Street was vacated without notice to the plaintiffs; that the ramps on Fourth Street impede pedestrian traffic on the northerly side of Fourth Street and adversely affect plaintiffs' businesses located on the op-

posite side of Fourth Street. Actually, the scissors ramps protect pedestrians who walk on the public sidewalk underneath the ramps. Without the ramps the automobiles entering and exiting the garage on Fourth Street would be at the same level as the public sidewalk, and it would be very dangerous for pedestrians to walk thereon.

In their third amended complaint filed in 1969, the plaintiffs, in addition to the foregoing, have charged the defendants with violation of their civil rights, conspiracy, fraud, violation of federal and state antitrust laws, and with everything else that they could think of, including the charge of depriving them of due process of law and the equal protection of the laws. They asked for injunctive relief and damages.

Defendants in the case, named in the Third Amended Complaint, were the City of Cincinnati; William C. Wichman, who was City Manager, and is now deceased; Cincinnati Redevelopment Corporation [CRC], a private Ohio corporation for profit, which purchased the land from the City after the City had acquired it by condemnation or by purchase, and had razed the old buildings. (CRC constructed the new parking garage thereon and sold and conveyed it for $4,000,000 to Adcor Realty Co., a subsidiary of Associated Dry Goods, Inc., which is also the parent corporation of H&S Pogue Co., Inc., a department store.) Continuing the list of defendants: Associated Dry Goods Co.; H & S Pogue Co., Inc.; Adcor Realty Co.; Morgan Guaranty Trust Co., which acquired the title to the property from Adcor Realty Co. under a lease-back agreement for the operation of the Pogue department store; the Regional Director of HUD; and the Secretary of the Department of Housing and Urban Development, the latter two of whom were voluntarily dismissed from the case.[1]

---

[1] The original complaint was filed in the District Court on July 2, 1966, about a year after CRC had acquired the land from the City at a cost of $587,770.04. In the original complaint there was no charge of antitrust violation.

On February 21, 1967, the District Court denied plaintiff's appli-

The District Court heard the case without a jury and decided against the plaintiffs on the issues of conspiracy, fraud and antitrust violations, but found in favor of the plaintiffs on the issue that the construction of the garage on Fourth Street, rather than on Elm Street, violated the Urban Renewal Plan, and that plaintiffs, although located outside the Urban Renewal area, had standing to file the action. The Court entered a mandatory –

> ". . . injunction against the City and Pogue's Division of Associated Dry Goods Corporation, jointly and severally, requiring them to alter the Pogue completed garage by installing two elevators at Fourth and Elm Street (in addition to the existing three elevators only 80 feet from the northwest corner of Fourth and Race Street) and to improve the fire tower on Fourth Street so that it and the elevators can serve the area in which the plaintiffs are located and thus counteract the blighting effect of the garage as constructed." (App. Vol. I, p. 55)[2]

We affirm the District Court in its decision that there was no conspiracy, fraud or antitrust violation. We reverse the mandatory injunction issued against the City and Pogue's.

---

cation for a preliminry injunction, to enjoin completion of the garage. An Amended Complaint was filed on June 8, 1967; the Third Amended Complaint was filed on January 27, 1969; the trial commenced on June 2, 1970, and was concluded on June 25, 1970; the Memorandum Opinion of the District Court was filed on July 26, 1971.

[2] Plaintiffs, who are located on the south side of Fourth Street and their customers, would have to walk only eighty feet from the northwest corner of Fourth and Race Streets to use the existing three elevators in the garage. There is no proof that the existing elevators are not adequate to serve properly the garage. Aside from the damage to the garage occasioned by the construction of unneeded additional elevators, the construction ordered by the Court might cost as much as $350,000. The exact amount of the construction so ordered has not been determined since the plans therefor have not been prepared.

I

STANDING

Pogue's new garage is located in Urban Renewal Block D, which block consists of an entire city block, bounded on the north by Fifth Street, on the south by Fourth Street, on the east by Race Street, and on the west by Elm Street.

Only the plaintiffs, whose places of business are located outside the Urban Renewal area, have filed suit. They claim that the location and design of the garage have resulted in economic injury to them.

The threshold question therefore is whether persons located outside the Urban Renewal area have standing to maintain this action. We are of the opinion that plaintiffs do not have standing.

Plaintiffs contended in the District Court that they do have standing on the following grounds:

1) As federal taxpayers;
2) Under the Administrative Procedure Act;
3) As persons having a personal stake in the outcome of the case; and
4) As private attorneys general.

The District Court ruled that plaintiffs' contentions were untenable as federal taxpayers and under the Administrative Procedure Act. We agree. The Court, however, held that they had standing as persons having a personal stake in the outcome of the case, and as private attorneys general. We disagree.

No cases have been cited to us by the Court or by the parties, nor have we found any cases, where persons located outside the Urban Renewal area have been permitted to question the design or location of buildings approved by the agency (the City, in the present case) as being in conformity with the Plan, said agency having been authorized by Congress to act. There is no general statutory right of appeal to the United States District Courts from decisions

of federal, local or public agencies, and private persons engaged in urban renewal projects under 42 U.S.C. § 1450, *et seq.* The Secretary is authorized to sue and to be sued. 42 U.S.C. § 1456(c)(1). Suits, of course, could be filed for violation of specific regulations adopted by the Secretary of HUD under the provisions of § 1455(c)(1) by persons having standing.

Nor do we find authority for the mandatory order issued by the District Court ordering the City and the purchaser of property from the redeveloper, to make changes in completed buildings which the purchaser had acquired in good faith and for which it had paid a large sum of money.

The District Court recognized that it was charting a new course in virgin territory, – a course which we believe would have an adverse effect on future Urban Renewal projects, if persons located outside the project may question the decisions relating to the project made by the duly authorized local public agencies.

Not only was the project approved by HUD, but the Plan and the design and location of the garage were specifically approved by the City.

Standing to sue as "private attorneys general" rests on an explicit provision in the regulatory statute conferring standing, which is absent here. *Data Processing Service* v. *Camp,* 397 U.S. 150, 153 n. 1 (1970).

Review of decisions of federal agencies may be obtained under the Administrative Procedure Act. Contrary to plaintiffs' claims, the City is not a federal agency as defined in the Act. 5 U.S.C. § 701(b)(1). Furthermore, the Director and the Secretary of the federal agency were voluntarily dismissed from the case by the plaintiffs.

The Act does not confer standing to seek judicial review upon anyone who suffers economic injury as a result of agency action, regardless of whether that person's private rights have been invaded. *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F.2d 955 (6th Cir. 1970); *Harrison-Halstead Com-*

munity Group, Inc. v. *Housing & Home Finance Agency,* 310 F.2d 99 (7th Cir. 1962).

Plaintiffs have no standing as federal taxpayers to question the design and location of the garage. They have not established a logical link between their status and the type of legislation which they are attempting to attack. They have not challenged a congressional enactment under the taxing and spending clause of Art. I, Sec. 8 of the Constitution, which is a prerequisite for standing under *Flast* v. *Cohen,* 392 U.S. 83 (1968). In addition, the Court said:

> ". . . [T]he taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." (*Id.* at 102-103).

No such nexuses have been established. Indeed, plaintiffs have not established any violation of a specific statute or constitutional provision.

The District Court relied on *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), wherein standing was held to exist in petitioner, a data processing company, to review a decision of the Comptroller of the Currency permitting National Banks, such as the respondent bank, to make data processing services available to other banks and bank customers. Review was provided for by the Administrative Procedure Act.

In addition to plaintiffs' claim to economic injury because of competition from the banks, the interest which they sought

to protect was arguably within the zone of interests to be protected and regulated by statute.

To the same effect is *Barlow* v. *Collins*, 397 U.S. 159 (1970), wherein review was sought under the Administrative Procedure Act. The Court, following *Data Processing Service, supra*, held that farmers who were eligible for payments under the Food and Agricultural Act of 1965, had standing to challenge the validity of an amended regulation issued by the Secretary of Agriculture, which amended regulation, they alleged, violated the Act.

The Court further held that the farmers had a personal stake and interest; that they were clearly within the zone of interests protected by the Act; and that the statutory scheme evinces a congressional intent that the Secretary's decision may be judicially reviewed.

Both *Data Processing* and *Barlow*, (unlike the present case) involve reviews sought under the Administrative Procedure Act. Both cases involved persons within the zone of interests protected, which is not true in the present case as plaintiffs' businesses were located outside the Urban Renewal area. While in *Data Processing* the Court found no prohibition against review, in *Barlow* the Court found congressional intent favoring review.[3]

In our case no review was provided by statute of acts of agencies and private developers of Urban Renewal projects. We think it was because review would frustrate implementation of Urban Renewal plans and would discourage cities and

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[3] The District Court relied heavily on *Norwalk* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), which we believe is inapposite. In *Norwalk* the plaintiffs were directly involved (by removal) in the Urban Renewal scheme. They alleged violation of a specific standard in the Urban Renewal Act, as well as racial discrimination. The complaint was dismissed on motion and the allegations were accepted as true. *Foster* v. *City of Detroit*, 254 F.Supp. 655 (E.D. Mich., 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968), is likewise inapplicable, as it involved due process violations in Detroit's condemnation procedures concerning the right to compensation on the part of property owners whose lands were taken.

redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project.

In our case, under no stretch of the imagination can it be claimed that plaintiffs, who were located outside the Urban Renewal area, were within the zone of interests protected by the statute. Since they had no money invested in the structures located in the Urban Renewal area, they had no personal interest or stake in the project.

The decision in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), is against the plaintiffs, as the Court held there that even under the Administrative Procedure Act the plaintiff and its members, who allegedly had a special interest in the conservation and the sound maintenance of the natural parks, game refuges, and forests of the county, did not have standing to enjoin federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioners in that case had not alleged that the challenged development would affect the Club or its members in their activities, or that they even used Mineral King, but alleged that the project would adversely change the area's aesthetics and ecology.

In our case, the District Court in its opinion stated:

> "It seems clear to the Court that the City could not have condemned the property in the south half of Block D for the purpose of erecting a garage such as the one the Developer built to the specifications of Pogue's.
>
> "In effect this would be condemning property for private purposes, and it needs no citation of authority to say that is not permitted." (App. I, p. 59).

This proposition was set to rest in the leading case on Urban Renewal, which case involved the District of Columbia. In *Berman* v. *Parker*, 348 U.S. 26 (1954), Mr. Justice Douglas, who wrote the opinion for the Court, stated:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent

domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 529-530; *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 679. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton* v. *North River Bridge Co., supra; cf. Highland* v. *Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose. (*Id* at 33-34)."

In making it clear that it is not the function of the Courts to sit in review of legislative determinations, the Court stated:

". . . But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Con-

gress. But as we already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis— lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States*, 147 U. S. 282, 298; *United States ex rel. T. V. A.* v. *Welch*, *supra*, 554; *United States* v. *Carmack*, 329 U. S. 230, 247.

The District Court indicated grave doubts concerning the Agency's right to take full title to land as distinguished from the objectional buildings located on it. 117 F. Supp. 705, 715-719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (*Id.* at 35-36).

The title to the land in Block D, on part of which the garage was constructed, was acquired by the City, either by purchase or condemnation. No such defense was interposed in any condemnation suit, nor is there any proof that any purchases made by the City were other than voluntary. The title of the purchaser may not be collaterally attacked here.

The case closest in point to the present one is our decision

in *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970). In that case the plaintiff, which held a leasehold interest in certain commercial property located in Cleveland, sued the City for damages to its leasehold interest, the value of which was alleged to have been destroyed by the activity of the City in establishing its Urban Renewal project. Plaintiff claimed that such activity violated its rights under the Fifth and Fourteenth Amendments to the Constitution. Plaintiff alleged that its leasehold was originally included in the Urban Renewal project, but that the City later excluded it and acquired instead adjacent property belonging to plaintiff's tenants, thereby depriving plaintiff of its tenants.

In affirming the judgment of the District Court dismissing the complaint, we stated that there had been no taking of plaintiff's property within the meaning of the Fifth and Fourteenth Amendments requiring the payment of just compensation; that the losses sustained by plaintiff did not result from any intrusion or encroachment on plaintiff's property. "Its leasehold estate has remained intact." *Id.* at 958. Plaintiff's losses resulted from the transformation of the neighborhood from a residential neighborhood to vacant land. We followed *Berman* v. *Parker*, *supra*, in holding that the drawing of boundary lines for a public project is a matter of legislative discretion, and it is not the function of the courts to review such discretion. We stated:

> "When reduced to its essence, the issue presented upon this appeal is whether a property owner having property adjacent to an urban renewal project may maintain an action for compensation under the Fifth and Fourteenth Amendments of the Federal Constitution for depreciation in the value of his property by reason of the establishment of the project. This Court is of the opinion that he cannot." (*Id.* at 959).

In *Campbell* v. *United States*, 266 U.S. 368 (1924), the Court held that a property owner, a portion of whose land

was condemned for public purpose, was not entitled to compensation for damages to the residue occasioned by the acquisition and use of adjoining lands of others for the same project.

We followed *Berman* v. *Parker, supra,* in *Nashville I-40 Steering Comm.* v. *Ellington,* 387 F.2d 179 (6th Cir. 1967), holding that the routing of public highways was a prerogative of the executive department of the state, and not the judiciary.

Further, in order to have standing, plaintiffs must establish that they have a legal interest to maintain the suit, that the right invaded –

> ". . . is a legal right, – one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." (*Tennessee Power Co.* v. *TVA,* 306 U.S. 118, 137 (1939)).

See also *U.S. ex rel. TVA* v. *Welch,* 327 U.S. 546 (1946); *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938). Plaintiffs have established no such rights. Whatever damages plaintiffs sustained as a result of the Urban Renewal project are *damnum absque injuria.*

Under Ohio law plaintiffs, as owners or lessees of land abutting on the south side of Fourth Street, have no property right in the continuation or maintenance of the flow of traffic past their property, and the diversion of traffic as a result of public improvement is not an impairment of a property right for which damages may be awarded. *State ex rel. Merritt* v. *Linzell,* 163 Ohio St. 97 (1955). As a matter of fact, the width of Fourth Street was not changed in the improvement.

Plaintiffs complain about not having received notice from the City of the vacation of a portion of Fourth Street. Actually, the portion vacated was not the traveled portion of the street, but included the north sidewalk, the location of which was changed by an exchange of easements and was relocated on Pogue's property and underneath the ramps.

Plaintiffs were not abutting owners of land on the north side of Fourth Street and were not entitled to notice under Ohio law. Ohio Rev. Code, § 723.06.

In essence, all that plaintiffs are really complaining about is the fact that they did not receive the benefits from the Urban Renewal project which they expected.

II

LIABILITY OF THE CITY OF CINCINNATI

The City is a political subdivision of the State of Ohio. It is not a "person" within the meaning of the Civil Rights Act and Congress did not intend that municipal corporations should be amenable to the Act. 28 U.S.C. § 1343; 42 U.S.C. § 1983; *Moor* v. *County of Alameda*, — U.S. — (No. 72-10, 41 U.S. L.W. 4627 (1973)); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Johnson* v. *City of Cincinnati*, 450 F.2d 796, 798 (6th Cir. 1971).

There is an additional reason why the City cannot be held liable in this action. In its activities under the Urban Renewal project it was engaged in the performance of a governmental, and not a proprietary, function. It was exercising the police power of the state. It cannot be held liable for the performance of such acts. *Broughton* v. *Cleveland*, 167 Ohio St. 29 (1957); *Wooster* v. *Arbenz*, 116 Ohio St. 281 (1927).

III

LIABILITY OF POGUE INTERESTS

Inasmuch as the City is not liable for economic injury allegedly sustained by plaintiffs on account of the Urban Renewal Plan, it is difficult to see how Pogue's, whose sin was to purchase a completed garage and to pay $4,000,000 for it, could possibly be held liable.

Plaintiffs complain that the Plan was changed to locate the garage on Fourth Street instead of on Elm Street. Actually, it is located on both streets. The City contends that the Plan was never changed; that brochures, reports, newspaper articles, etc., on which plaintiffs and the District Court relied as indicating a location on Elm Street, were illustrative only and were not a part of the Plan. City Council did approve the design and location of the garage.

But even if the City did change the location and design, it had the right to do so, as was held in *Woodland Market Realty, supra,* where the city changed its original plan to include plaintiffs in the urban renewal area and then changed its plan to exclude plaintiffs.

In our opinion, a public hearing was not required even if the City did change the design or location of a building in Block D.

Plaintiffs were tardy in filing their suit nearly one year after the City had passed an ordinance approving the bid of CRC as being "in accordance with the Urban Renewal Plan," and after the property was conveyed by the City to the redeveloper.

IV

ANTI-TRUST VIOLATIONS

The District Court found that there was no evidence of any conspiracy to restrain trade. We agree.

Although most of the plaintiffs and Pogue's have been engaged in business in Cincinnati for many years, no claim of antitrust violation was ever made against Pogue's until after it acquired its new garage.

Participation in an Urban Renewal project does not violate the antitrust laws.

Plaintiffs allege that the relevant market was a "dramatic elbow" at the corner of Fourth and Elm Streets. This claim is ridiculous. There was no proof of any relevant market.

There was no proof of any real competition between the plaintiffs and Pogue's. The antitrust claims are frivolous.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

EDWARDS, Circuit Judge, concurring specially. This is a complex and difficult case. In my judgment there is merit to the plaintiffs' claims of economic injury as found by the District Judge. Unfortunately for plaintiffs, however, both the applicable statutes and the case law require decision of the merits of those claims before the legislative body of the City of Cincinnati, and do not allow for the subsequent judicial remedy ordered by the District Judge.

I join the result reached by Judge Weick's opinion. I also join it in its disposition of plaintiffs' antitrust appeal and in its disposition of plaintiffs' claims of city ordinance and state law violations.

I also agree that no appeal procedure from the legislative decisions of the Cincinnati City Council pertaining to the Council's formulation and adoption of the Urban Renewal Plan was provided by Congress in 42 U.S.C. § 1950 et seq. (1970). and that under the fact posture of this case no appeal is permissible under the terms of the Administrative Procedures Act, 5 U.S.C. § 702 (1970).

I believe, however, that the findings of fact of the District Judge concerning plaintiffs' claims of economic injury are not clearly erroneous and that plaintiffs had standing to bring this suit. *See Data Processing Service Corp.* v. *Camp*, 379 U.S. 150 (1970). In my judgment, however, the proofs do not serve to support the District Judge's conclusion of violations of plaintiffs' Fourteenth Amendment rights to due process and equal protection, and hence, this case should have been dismissed under the authority of *Berman* v. *Parker*, 348 U.S. 20 (1954); *United States ex rel. TVA* v. *Welsh*, 327 U.S. 546 (1946); *Tennessee Electric Power* v. *TVA*, 306 U.S. 118 (1939), and *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970).

As to *Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968), and *Norwalk* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), I consider them not controlling for the reasons set forth in footnote 3 to Judge Weick's opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

NO. 6197

GIBSON & PERIN CO.; GIBSON & PERIN BUILDING CO.; THE GILLMAN KNIT WEAR CO.; THE GILSEY SHOE & HANDBAG CO., INC.; J. & L. REALTY, Tenant in Common with Louis Lazarus, Mrs. Gordon Reis, and Lucien Lazarus (formerly listed as SYLVAN JOSEPH); JOSEPH KARP; GILBERT KARP, d.b.a. Main Auction Galleries; KOCH EMBROIDERY & PLEATING SHOP, INC.; LOWENTHAL'S, INC.; ROEPER, HANSON, NEWMAN CO. (formerly listed as ROPER, HANSON, NEWMAN CO.); PIGALL'S FRENCH RESTAURANT, INC.; ALDAN COMPANY (formerly listed as AL LEVINE); NANBIL, INCORPORATED,

Plaintiffs,

vs.

CITY OF CINCINNATI; WILLIAM C. WICHMAN; CINCINNATI REDEVELOPMENT CORP.; ASSOCIATED DRY GOODS CORPORATION; H. & S. POGUE CO., INC.; ADCOR REALTY COMPANY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; A. DEAN SWARTZEL; GEORGE ROMNEY,

Defendants.

MEMORANDUM OF DECISION

(Filed July 26, 1971)

PORTER, J.:

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SUMMARY OF WHAT CASE IS ABOUT AND COURT'S CONCLUSIONS

This is a difficult and exceptional urban renewal case. It involves a complaint by persons in the immediate vicinity of one of the first blocks developed against an alleged violation of the plan. There is no complaint about urban renewal generally.

On the contrary, there was implicit agreement by the plaintiffs with the statement of the Director of Urban Renewal in Cincinnati that in general urban renewal has been a great success and a great boon to the City. However, those bringing this suit say the system broke down in a way which affects then adversely, to say the least, at the point when urban renewal was "just getting off the ground."

Plaintiffs are property owners and/or businessmen on the south side of Fourth Street between Race and Elm Streets in Cincinnati, Ohio. Their businesses and properties are outside (across the street from) the south half of Block D in the Central Business District (hereinafter CBD) urban renewal project. This block was bounded by Race and Elm Streets on the east and west and by Fourth and Fifth Streets on the south and north. All were led to expect that the north side of Fourth Street would be developed for retail and office space, with a shoppers garage on Elm Street between Fourth and Fifth Streets, one which would serve the area in which the plaintiffs are located.

Plans along that line did not "sell." The City, yielding to the "realities of the market place" (R. 487), and desperate to get something going in the Central Business District in order to restore waning faith in urban renewal (R. 773), not only approved the construction of the garage on Fourth Street between Elm and Race, but approved a single-purpose shoppers garage with scissors ramps designed solely for Pogue's, whose store is east of Block D at the corner of Fourth and Race Streets.

The plaintiffs were bitterly disappointed and fought the proposed change tooth and nail, but without success. Then they brought this suit for an injunction and other relief against the City, the Redeveloper, H. & S. Pogue Company Division of Associated Dry Goods Corporation, and others. It came on for hearing in June, 1970, long after the garage was built, and after a long trial, it was finally submitted for decision some months later.

There is no question from the evidence but that the plaintiffs have a meritorious grievance. The big question is whether such grievance is one for which the plaintiffs have a right to redress in the courts. The Court has concluded that they have such a right to redress because the departure from the urban renewal plan was an abuse of discretion and plaintiffs were denied equal protection of the laws and due process in the implementation of the change. We have concluded that the plaintiffs are entitled to an injunction against the City, the Redeveloper, Pogue's division of Associated Dry Goods Corporation, jointly and severally, requiring altering the Pogue garage as constructed by installing elevators at Fourth and Elm Streets and improving the firetower on Fourth Street so that it and the elevators can serve the area in which the plaintiffs are located, and thus counteract the blighting effect of the garage as constructed. We also conclude this is an appropriate case for the defendants to pay the plaintiffs' extensive costs and attorney fees.

We find no basis in law for damages except as an alternative to equitable relief. The Court reserves the right to assess damages as such alternative if appropriate equitable relief cannot be fashioned in the circumstances.

The foregoing is based on the following findings of fact and conclusions of law on what the Court views as the heart of the plaintiffs' case — their fourth cause of action — "Urban Renewal."

URBAN RENEWAL THEORY OF RECOVERY – FOURTH CAUSE OF ACTION – FINDINGS OF FACT

1. With reference to standing, the Court finds that the plaintiffs are all taxpayers and owners of real estate and/or business establishments directly affected by the urban renewal development of Block D. (As to the particulars of the effects, see Appendix A, plaintiffs' proposed findings of fact, urban renewal, pages 1, *et seq.*)

2. Some of the plaintiffs were forced to move from Block D under the threat of condemnation proceedings and resettled on the south side of Fourth Street between Race and Elm Streets (*Id.*, pages 2, *et seq.*). Some of the plaintiffs were encouraged by City officials to relocate where they now are (*Id.*, page 3), and others remodeled or renovated their premises at substantial expense because of their level of expectation as to the development of Block D (*Id.*, pages 3-4). We agree with the plaintiffs that they have a personal stake in the outcome of this litigation, as they are citizens of the immediate area whose businesses and property are directly affected by the design and construction and operation of the Pogue Garage in Block D (*Id.*, pages 5, *et seq.*).

3. It is also clear that the plaintiffs have been actively engaged in trying to rectify the situation by seeking relief from the officials of defendant Cincinnati Redevelopment Corporation and defendant Associated Dry Goods Corporation (*Id.*, pages 9, *et seq.*).

4. It is also clear that plaintiffs could not obtain preliminary injunctive relief because the cost of a jurisdictional bond to prevent construction of the garage would have been prohibitive.

5. It is important to note the features of the urban renewal plan under which the property in Block D was acquired by the City of Cincinnati was cleared and conveyed to the defendant Cincinnati Redevelopment Corporation for the construction of the Pogue Garage for the defendant Associated Dry Goods Corporation.

6. For the particulars of the boundary description, see plaintiffs' proposed findings of fact, urban renewal, page 10. Suffice it to say here that one boundary is the south line of Fourth Street to the intersection of the south line of Fourth Street and the west line of Elm Street and thence north along the west line of Elm Street to Seventh Street.

The objectives of the plan (px A-3) are in part:

"D. To improve the usefulness and desirability of the Core and Core functions by . . .

(2) facilitating the movement of vehicular and surface traffic within the Core; providing where possible vehicular traffic on lower levels (below grade) with pedestrian circulation at or above grade . . .

• • •

(4) providing adequate parking as close to destination goal as possible . . .

(5) providing efficient pedestrian linkages between the Core and complimentary uses" (*Id.*, pages 10-11).

The plan says that as to Area D ". . . predominate use as retail, parking and motor hotel with additional, but not predominate use for office." There was the same objective for Block G, which the plan indicates should be treated with D as a single entity.

Details of the proposed program of space and use were given (Id., pages 11-12), and basic organization of plan was:

"• • • Retail continuity is to be retained in the design of areas of D and G with orientation primarily toward Race Street and secondarily toward Fifth Street."

The plan said:

"• • • The design shall recognize the pedestrian movements at grade and on the second level" (*Id.*, page 12).

Under this plan the City acquired the real estate on which the Pogue garage was constructed, including the Fifth Street driveway to it, at a cost of $2,448,200 and the cost of demolishing the structures thereon to the City was $107,758 (px A-30). The said premises were sold to the defendant Cincinnati Redevelopment Corporation for construction of the Pogue garage for $587,770.04 (px A6-(a) and A-6-(b)); see plaintiffs' proposed findings of fact, urban renewal, pages 12-13).

The Court agrees with the plaintiffs (see plaintiffs' proposed findings of fact, urban renewal, page 15) that:

> ". . . the change of locations of the parking garage from Elm Street to Fourth Street as well as other alterations constituted a material modification of the 'intent and balance' of the said urban renewal plan for Block D. . . ."

That being the case, public hearings and legislative action should have been held by City Council. They were not. Council meetings at which changes were approved did not provide an opportunity for those adversely affected by the plan to be heard. In fact the public was not allowed to speak out at such meetings.

A close look at what the plan was, the changes made therein, and how the changed plan was implemented is critical to show *why* the Court agrees with the plaintiffs' proposed findings. In this connection we adopt as our own the following carefully prepared and comprehensive findings proposed by the plaintiffs. We do so (1) because we cannot improve on the proposed findings, and (2) to show the meticulous care with which all aspects of this complex case were presented on behalf of plaintiffs to give an idea of the trouble to which plaintiffs have been put because of what they characterize as administrative arrogance.

> "(18j) The Pogue garage development in Block D constituted a material modification of the intent and balance contained in the designed plan as laid down by the Urban

Renewal Plan for Block D. See pl. exh. A-3; Dr. Corey, 12tr. 1121, *et seq.*; Mr. MacConnell, 21 tr. 2163; Findings of Fact under paragraph 7.

"(18 k) *'The Urban Design Plan for the Central Business District was based in large part on an illustrative development plan for the various blocks in the Central Business District* * * *" (emphasis added), Minutes of Urban Design Review Board prepared by Peter Kory, Secretary, and attached to Notice of Hearing of Urban Development Committee of City Council, October 17, 1966, pl. exh. A-16.

(1) 'On Elm Street, in Block D, there is a 1200 car garage, serving multiple purposes, but oriented primarily towards shopper parking,' page 38, Vol. I, 'The Plan for Downtown Cincinnati,' pl. exh. A-1.

(2) The schematic representation of Block D, as well as the photographic representation of Block D on page 38 of Volume I, 'The Plan for Downtown Cincinnati,' published by the City of Cincinnati both disclosed that the garage in Block D was to be located on the east side of Elm Street between Fourth and Fifth Streets with vehicluar access from Fourth, Fifth and Elm Streets; and that an office tower was to be located on the north side of Fourth Street between Race and Elm Streets with retail at ground level.

(3) The foldout illustration attached to the front cover of Volume I, 'The Plan for Downtown Cincinnati,' pl. exh. A-1, discloses the shoppers garage to be located on Elm Street between Fourth and Fifth Streets and an office tower on Fourth Street between Race and Elm Streets on Block D.

(4) All of the illustrative site plans for Block D following page 256 of Volume III of 'The Plan for Downtown Cincinnati,' being the 'Docu-

mentation for the Central Business District Urban Design Plan, December ...., 1964,' pl. exh. A-2-b, all disclose the shopper parking garage on the east side of Elm Street between Fifth and Fourth Streets and in an office tower on the north side of Fourth Street between Race and Elm Streets in Block D.

(5) The schematic drawing for Block D, pages 56 and 57 of Volume II, 'The Plan for Downtown Cincinnati,' which volume was officially designated by the City of Cincinnati as the Urban Design Plan, shows the parking development to be along the east side of Elm Street between Fourth and Fifth Streets in Block D with vehicular access to same from and to Fourth, Fifth and Elm Streets. Pl. exh. A-2-a.

"(18l) The Urban Renewal Plan, pl. exh. A-3, provides that in the basic organization for Block D 'the development of office space in Area D shall be oriented to Fourth Street so as to maintain a proper relationship to the general office core;' and that Fourth Street shall be '50 feet wide from the sub to curb throughout.'

"(18m) Volume II of 'The Plan for Downtown Cincinnati,' being the Urban Design Plan aforesaid, also specifically provides at page 70 that the development of office space in block D shall be oriented to Fourth Street so as to maintain a proper relationship to the general office core and that Fourth Street will be 50 feet wide from curb to curb throughout, and at page 71, that the entrances and exists to the parking facility shall be limited to Elm Street, Fifth Street and Fourth Street, there being no distinction between vehicular entrances and exists and pedestrian entrances and exists, and that the design shall recognize pedestrian movements at grade and on the second level. pl. exh. A-2-a.

"(18n) On December 4, 1964, the Urban Development Department of the City of Cincinnati released information to the public press concerning the sale of Block D

disclosing that the approved development plan for said Block D provided for a shopper parking garage to be located on Elm Street between Fourth and Fifth, retail as well as office space along Fourth Street. Pl. exh. H-19.

"(18 o) The property plat prepared by the Department of Urban Development of the City of Cincinnati dated March 18, 1965, being pl. exh. F-12, and part of the bidding documents for the development of Block D, disclosed that the approved development for Block D provided for a shopper parking garage on Elm Street between Fourth Street and Fifth Street, retail and office [space] on the north side of Fourth Street between Elm and Race Streets, and retail [space] on the balance of the block.

"(18 p) No further publicity concerning the development of Block D was released by officials of the City of Cincinnati to the public press prior to the filing of this lawsuit, other than to state on or about May 20, 1965, that negotiations with proposed redevelopers for the Central Business District would be conducted in executive session. Pl. exh. A-12.

"(18 q) There were no public hearings at which parties interested in the development of Block D were notified to be present and to present their views concerning same, conducted by the City Planning Commission of the City of Cincinnati, the City Council of the City of Cincinnati, or the Urban Development Committee of the City Council of the City of Cincinnati prior to the filing of this lawsuit.

"(18 r) Defendant Associated Dry Goods Corporation issued a press release on or about May 20, 1965, including an architect's drawing of a proposed shopper parking garage to be located on the north side of Fourth Street between Race and Elm Streets with a bridge across Race Street into Pogue's department store and with retail [space] along the north side of Fourth Street. Pl. exh. A-12.

"(18 s) On February 26, 1966, there appeared in *The Cincinnati Enquirer* an architect's drawing disclosing that the Pogue shopper parking garage would be located on the north side of Fourth Street, connected to Pogue's department store by a bridge across Race Street and would have scissors-type ramps for vehicular access to the garage from Fourth Street. Pl. exh. A-24.

"(18 t) The level of expectation of the plaintiffs as to the Urban Renewal Plan for Block D prior to the publicity in May, 1965, pl. exh. A-12, showing the proposed Pogue garage on the north side of Fourth Street between Race and Elm Streets, was that the parking facility for Block D was going to be located on the east side of Elm Street between Fourth and Fifth Streets, an office tower on the north side of Fourth Street between Race and Elm Streets with retail stores along the north side of Fourth Street and retail [space] in the balance of said Block D. See Lowenthal, 9 tr. 835; Gorodesky, 11 tr. 1023; P. Karp, 10 tr. 964; Greenberg, 15 tr. 1469; Perin, 16 tr. 1543; Joseph, 10 tr. 1635; Koch, 18 tr. 1766; Gollusch, 18 tr. 1811; J. Karp, 18 tr. 1824; D. Levine, 19 tr. 1859 to 1861; Gillman, 19 tr. 1895.

"(18 u) See Findings of Fact concerning plaintiffs' inability to see plans, 9r-9u [below]:

"(9 r) Following the publication of February 26, 1966, in *The Cincinnati Enquirer* of the architect's drawing of the proposed Pogue garage showing the scissors ramps on Fourth Street, see pl. exh. A-24, Messrs. Lowenthal, Greenberg and Gillman, in March, 1966, went to City Hall to the Department of Urban Development to see the plans for said garage but were refused permission to examine them. See Lowenthal, 9 tr. 836; Greenberg, 15 tr. 1467; Gillman, 19 tr. 1897-1899.

"(9 s) Thereafter, at a meeting in Pigall's French Restaurant on June 6, 1966, Mr. Peter Kory, the Deputy Director of the Department of Urban Development for the City of Cincinnati, and representatives of Pistler-Brown architectural firm, met with representatives of

the plaintiffs to explain the project 'A Master Plan for the Fourth Street Area,' pl. exh. A-8; and to discuss the plans for the Pogue garage. At this meeting the plaintiffs vigorously registered their objections to the plans for the Pogue garage, particularly with reference to the lack of pedestrian access from Fourth Street to and from the garage, as well as the fact that the ramps as designed would be unsightly and eliminate pedestrian traffic on the north side of Fourth Street between Race and Elm Streets. It was at this meeting that Mr. Kory agreed that the plans for the Pogue garage limiting pedestrian access to the elevator tower on Race Street and using scissors ramps for vehicular access from Fourth Street and a ramp from Elm Street as well as vehicular access from Fifth Street were characterized as a *fait accompli.* See Karp, 7 tr. 673.

"(9 t) The publication 'A Master Plan for the Fourth Street Area,' pl. exh. A-8, prepared by Pistler-Brown Architects, the cost of which was underwritten by the Department of Urban Development of the City of Cincinnati which was released to the public on March 4, 1966, pl. exh. A-23, disclosed that there was to be an interior walkway from midblock between Race and Elm Streets on the north side of Fourth Street inside the proposed garage to Race Street, and at no place indicated that pedestrian access to the garage would be limited to Race Street only.

"(9 u) The first time that plaintiffs learned that City Council had passed certain ordinances vacating a portion of Fourth Street, Race Street, Elm Street, so that the Pogue garage could be constructed as illustrated in pl. exh. A-24, was at the meeting with the City Manager on June 28, 1966. See, for example, Gillman, 19 tr. 1904; A. Levine, 20 tr. 1947."

The garage violates the urban renewal plan for Block D.

It seems clear to the Court that the City could not have condemned the property in the south half of Block D for the

purpose of erecting a garage such as the one the Developer built to the specifications of Pogue's.

In effect this would be condemning property for private purposes, and it needs no citation of authority to say that is not permitted.

Along that line, the plaintiffs contend that by granting favored treatment to the Developer and Pogue's division of Associated Dry Goods Corporation, and in other ways, in the implementation of the changed urban renewal plan, they were deprived of equal protection of the laws and due process. They contend the implementation of the urban renewal plan resulted (in addition to favored treatment mentioned above) from permitting the change in the location of the Pogue garage to the north side of Fourth street without procuring the approval of the working review committee of the Central Business District; by failing to procure a reappraisal of Block D after approving plans for the Pogue garage exclusively benefiting the Pogue division of Associated Dry Goods Corporation; by approving the plans for said Pogue garage when the same did not conform to the alleged urban renewal plan as illustrated by the urban design plan; by keeping plans for the Pogue garage secret until after the adoption of ordinances providing for ramps on Fourth Street; by failing to give notice or to procure the consent of plaintiffs to the vacation proceedings requisite to the construction of the garage ramps; by conveying the real estate to the Developer secretly after promising not to do so before a certain date; by issuing a building permit to the Developer with knowledge of the plaintiffs' complaints and that the plans for the garage did not conform to the urban renewal plan as illustrated by the urban design plan.

In this connection, the plaintiffs also contend that one of the respects in which the implementation of the plan denied them due process and equal protection was by misleading the Urban Renewal Administration in Washington, D. C., that certain matters were being undertaken to alleviate the plaintiffs' plight, when, in fact, such was not the case; by never

consulting or permitting plaintiffs to participate in the design of the garage in Block D as presently designed; by failing to provide plaintiffs with access to adequate parking for their customers under the design for the Pogue garage, resulting in a "death sentence" upon plaintiffs; by permitting the modification of the "intent and balance" of the design for Block D without conducting the necessary public hearing and taking the necessary legislative action; and, finally, by depriving plaintiffs of their easement of light, air and view, and by placing and maintaining ramps on the public portion of Fourth Street without compensation.

The Court agrees with most of these contentions. With some the Court cannot agree and others seem overstated. For instance, the Court cannot find that the real estate was conveyed to the Developer "secretly" or that there was any promise not to do so before a certain date, though we do find that representatives of the plaintiffs were under the definite impression that the real estate would not be conveyed before the July 4 weekend.

As to the contention that the plaintiffs were never consulted as to the design of the garage, we think this is interesting and relevant, but not the basis for a contention of denial of due process and equal protection of the laws. It is clear the plaintiffs were "included out" as far as the design of the garage was concerned. We do not view this, standing alone, as a denial of due process or equal protection of the laws, but it is nevertheless worthy of note in connection with the broader contentions which plaintiffs make.

For reasons which will be given later when the plaintiffs' Fifth Cause of Action is discussed, the Court does not agree with the plaintiffs that they were deprived of their easement of light, air, and view, and that the ramps on Fourth Street were placed there "without compensation."

This is not to say that the ramps and the garage as designed do not have a detrimental effect on the plaintiffs. It is clear that the contrary is the case.

Along that line, there is substance to the contention of the plaintiffs that the design of the garage results in a "death sentence" upon the plaintiffs. The phrase "death sentence" obviously is used to tie in this case with that same phrase as used in *Stratford Motel* v. *Dayton Inn* (a 1965 unreported decision of the Court of Appeals of Montgomery County, Ohio, motion to certify overruled December 16, 1966). That was an action in which the plaintiff sought to enjoin the City of Dayton from appropriating for urban renewal purposes vacant lots used for off-street parking facilities incident to the operation of the Stratford Motel located on West First Street in Dayton, Ohio. The Court noted that the City's action imposed a "death sentence" upon the motel and therefore exceeded the City's discretionary powers. As in this case, the Court also noted that the City's action did not prevent the recurrence of conditions of blight, but fostered them.

While we do not find the analogy inappropriate, we would not go so far as to say the construction of the garage imposed a "death sentence" on the plaintiffs. However, the proof was overwhelming that the garage has a detrimental effect on the plaintiffs. This is certainly the same thing as saying that the authorization of the construction of the garage was an unauthorized departure from the urban renewal plan because it fosters blight.

In that connection it is in order to call attention to certain testimony. For one thing, plaintiffs' counsel was, and I recall, encouraged to study other garages, such as that of Stix, Baer and Fuller, in St. Louis, Missouri, and he did. This garage employed ramps. Also it was a single-purpose garage, like Pogue's Garage. The space which it had for retail went begging, and it seemed to have a detrimental effect on the property across the street. Another piece of evidence to be noted is that the City of Cincinnati steered clear of ramps in connection with any other garages in the urban renewal area. This could be because the locations of such garages did not lend themselves to ramps. But it could also be be-

cause of the lesson learned as a result of the construction of ramps on Fourth Street. We are not forgetting that the City put on credible evidence that the garage functions well in separating prospective shoppers from their automobiles and moving traffic both in and out of the Core area. But the construction of the ramps definitely has a detrimental effect on the property across the street from such ramps.

Another bit of evidence which it is in order to note in this connection is that the sidewalk under the ramps is a passageway and not an arcade. This is shown by the fact that the City at the time of trial was in the process of considering the installation of mirrors at the beginning of the passageway because so many people heading west on the north side of Fourth Street thought the sidewalk ended where the passageway begins.

Lastly, it is in order to note that the planners expected that something like a tire center could and would be located on the ground floor of the garage at Fourth and Elm Streets, but the space went begging, and Associated Dry Goods (Pogue's division) had given up trying to find a tenant for that space, and, at the time of trial, it was being used for private parking.

So much for the plaintiffs' contentions in support of the claim that there was a denial of due process and equal protection of the laws – the few claims with which the Court does not agree or with which the Court's agreement must be qualified.

The Court agrees with all the other contentions and, here again, the particulars are important to show why, because they are an integral part of the extreme circumstances which call for injunctive and other relief (attorney fees and costs). For the purpose of supplying the particulars, we adopt (with minor variations) the following proposed findings of fact submitted by the plaintiffs.

"(4) *The implementation of the alleged Urban Renewal Plan by said defendants deprived plaintiffs of the*

equal protection of the laws and due process under the Fourteenth Amendment of the Federal Constitution in the following respects:

"(a) *By granting favored treatment to defendants Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation:*

"(7b) The bidding documents published by the City of Cincinnati in the spring of 1965 for competitive bidding for the redevelopment of the CBD Core Project provided that the approved development for Block D included a shoppers garage on the east side of Elm Street between Fourth and Fifth Streets, an office and retail project on the north side of Fourth Street between Race and Elm Streets and the balance being retail, and the redevelopment of Block A, bounded by Fifth Street, Vine Street and Walnut Street, according to said documents provided for a major office building. See pl. exhs. F-12, F-21.

"(7c) Defendant Cincinnati Redevelopment Corporation did not wish to build an office project in Block D of the CBD core project which would compete with the office tower in Block A it would be obligated to construct if it was selected as the redeveloper for Block A as well as Block D. See pl. exh. F-66.

"(7d) Defendant Associated Dry Goods Corporation since its acquisition of Pogue's department store in Cincinnati, has been working to procure a shoppers parking garage at Fourth and Race Streets. Condon, 14 tr. 1324.

"(7e) Defendant Associated Dry Goods Corporation through its representatives, including Edward M. Condon and William A. Mitchell, contacted all potential redevelopers for Block D in the spring of 1965 for the purpose of procuring a commitment

from each redeveloper that if it was the successful bidder, it would construct the garage in Block D in accordance with plans and specifications prepared by Associated Dry Goods Corporation. Condon, 14 tr. 1390; pl. exhs. F-19, F-65.

"(7 j) Defendant City of Cincinnati through its officials granted the defendant Cincinnati Redevelopment Corporation favored treatment in the competition for the development of Block A and D in that it sold Block A to said defendant for approximately $600;000 less than the original re-use appraisals for said Block without procuring new re-use appraisals prior to awarding the contract to said defendant, and by failing to solicit new bids to potential redevelopers for said Block A on the basis of the new re-use appraisal which it acquired from only one of the re-use appraisers after having awarded the contract to said defendant. See Kory, 27 tr. 2755; deft. exh. 31; MacConnell, 21 tr. 2183.

"(7 k) In regard to Block D, said defendant Cincinnati Redevelopment Corporation was granted favored treatment in the competition for the development of Block D by being permitted to construct a single-purpose low-rate shoppers parking garage for Pogue's on the north side of Fourth Street between Race and Elm, and in being excused from the obligations of designing a structure capable of supporting approximately 240,000 square feet of office space oriented to Fourth Street as was provided for in said defendant's bid for Block D. Kory, 27 tr. 2746-2751; pl. exhs. A-28 and G-21; MacConnell, 21 tr. 2176; Corey, 12 tr 1167-1170

"(7 l) The cost of constructing a garage in said area was $10.00 per square foot, or $3,247,797 as compared with $24.00 per square foot for office space. Stipulation, 20 tr. 2008.

"(7 m) Defendants City of Cincinnati, Cincinnati Redevelopment Corporation and Associated Dry

Goods Corporation agreed in executive session that the specifications for the development of Block D of the CBD Urban Renewal Plan would provide that there would be a shoppers garage to be constructed on the north side of Fourth Street between Race and Elm Streets, that said garage would be the first project to be undertaken in Block D, and that said defendant Cincinnati Redevelopment Corporation would have the right in parcelizing Block D so as not to require the payment of the entire consideration of $1,400,000 for said Block D. Pl. exh. G-21.

"(7 n) Said defendant Cincinnati Redevelopment Corporation has received favored treatment by defendant City of Cincinnati in not being required to pay for the balance of Block D in accordance with the terms of Ordinance No. 276-1965 and the report describing the essential provisions in the contract, being pl. exhs. A-5 and F-16 consolidated in. Said defendant Cincinnati Redevelopment Corporation failed to pay for the balance of Block D in accordance with the letter of January 2, 1968, exh. A-33-B, from the City of Cincinnati, and said defendant was specifically relieved of the obligation to do so pursuant to City Ordinance No. 92-1970 adopted in April, 1970, pl. exh. A-33-A.

"(7 o) Said defendant Cincinnati Redevelopment Corporation received favored treatment by defendant City of Cincinnati in being permitted to parcelize Block D and not pay for it within a period of one year, since the City's re-use appraiser for Block D, Real Estate Research Corporation, on July 23, 1965, advised the City:

> "Ordinarily, we would recommend against a takedown procedure of this type; but as we understand it, the total takedown will all be accomplished within one year. • • • We assume the local public agency has taken the necessary procedures to qualify the developer

for this type procedure and that the *necessary contract requirements will be fulfilled.*" (Emphasis added.) Pl. Exh. E-45.

"(7 p) Defendant Cincinnati Redevelopment Corporation between January 2, 1968 and April 1, 1970 was in default under its redevelopment contract with the City of Cincinnati for which no action was taken on the part of the defendant City of Cincinnati to correct the default and/or enforce the contract.

"(7 q) • • • No alternative plans for the design or location of said garage in Block D were submitted and/or considered. See Kory, 27 tr. 2759-2765.

"(7 r) Defendants Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation received favored treatment in being permitted to place ramps on Fourth Street for vehicular traffic, as the primary purpose for the design of said ramps was to have the vehicular entrances to Pogue's garage as close to Race Street as possible; Condon, 14 tr. 1425, 1426; Rich, 29 tr. 2963; as well as to make more efficient use of the space that was available for the garage;' O'Day, 20 tr. 2063. As noted elsewhere in this decision, the use of scissors ramps ruined the north side of Fourth Street for use as retail. For instance, the sidewalk under the ramps is nothing more than a passageway, as shown by the fact mirrors need to be installed so those approaching the detour under the scissors ramps do not get the idea that the passageway is the end of the sidewalk. As noted elsewhere in this decision, such scissors ramps have a serious detrimental effect on property across the street as well.

"(7 s) Defendants Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation

received favored treatment by the City of Cincinnati in being relieved of the obligation of constructing an 'underground truck service area' required by the Urban Renewal Plan, pl. exh. A-3, so as to eliminate truck traffic from Race Street, as Race Street is designated as a pedestrian street in the said Urban Renewal Plan, because the cost of same was 'unthinkable,' Condon, 14 tr. 1321.

"(7 t) The design of said garage limiting pedestrian access to Race Street funnels such traffic into Pogue's department store through the use of the bridge across Race Street, so that pedestrian traffic on Fourth Street west of Race Street has been substantially diminished. See O. W. Perin, Jr., 16 tr. 1554; Roger Greenberg, 15 tr. 1477; Sylvan Joseph, 16 tr. 1636; Joseph Karp, 18 tr. 1829; Phyllis Karp, 10 tr. 972 and 973; Edward Koch, 18 tr. 1772; Herschel Lowenthal, 9 tr. 874, 875; Joseph Gollusch, 18 tr. 1815; Maurice Gorodesky, 11 tr. 1047; Daniel Levine, 19 tr. 1864; Mayer Gillman, 19 tr. 1905-1907; William MacConnell, 21 tr. 2170-2171.

"(7 u) According to the pedestrian traffic counts administered by the City of Cincinnati in June, 1960, pl. exh. R-3, and June, 1970, pl. exh. A-39, pedestrian traffic has decreased 43% on Fourth Street west of Race Street. See Young, 30 tr. 3002. However, it was down all over — even more.

"(7 v) Although the pedestrian traffic on the south side of Fourth Street according to the pedestrian traffic counts in pl. exhs. R-3 and A-39 only decreased 5.7% between 1960 and 1970, since there has been a decrease in excess of 75% between Race and Elm Streets on the north side of Fourth Street, it can be concluded that the pedestrian traffic on the south side of Fourth Street between Race and Elm now includes those who would have used the north side of Fourth Street, as well as those pedestrians walking to and from the City parking garage located at Fourth and Plum Streets.

"(7 w) The design of the scissors ramps for the Pogue garage and location of same on Fourth Street have a detrimental effect on plaintiffs' property and businesses, Gordon Rich, 6 tr. 530, and were designed for the exclusive benefit of Pogue's, without and consideration as to their effect on plaintiffs' property and businesses, Richard Rich, 29 tr. 2959.

"(7 x) Said garage was designed by Richard C. Rich, an architect retained by Associated Dry Goods Corporation and paid through Cincinnati Redevelopment Corporation. Rich, 29 tr. 2915.

"(7 y) Said architect designed the aforesaid garage exclusively to benefit Pogue's and was given a free hand to do so. Rich, 29 tr. 2916.

"(7 z) The Pogue garage was opened for business on June 1, 1967, and the financial records of the following plaintiffs: Gibson & Perin Company, The Gilsey Shoe & Handbag Co., Inc., Lowenthal's, Inc., Pigall's French Restaurant, Inc., Main Auction Galleries, disclose that there was a marked drop in the number of unit sales made by them after the opening of said garage. Each of said plaintiffs attributes the reduction in their sales aforesaid to the design of the garage, funneling pedestrian traffic into Pogue's department store and at least away from Fourth Street west of Race Street, so that said garage has effectively eliminated a substantial portion of the pedestrian traffic on which said plaintiffs are dependent for their business from Fourth Street west of Race Street. Gorodesky, 11 tr. 1047; Lowenthal, 9 tr. 875; Gibson & Perin, 16 tr. 1564, 1565; P. Karp, 10 tr. 972; Greenberg, 15 tr. 1447; Koch, 18 tr. 1772.

"(7 oo) Mr. Rich, the design architect of the Pogue garage, was given instructions to design the best garage possible for Pogue's. Rich, 29 tr. 2916. He gave no consideration to the possible effects the garage would have on the property and buildings

on Fourth Street, Rich 29 tr. 2936. The reason for limiting pedestrian access to Race Street was because this was best for Pogue's, Rich, 29 tr. 2967, 2942.

"(7 pp) The garage was not designed by Mr. Rich with the Urban Renewal Plan in mind, as he could not even recall whether he had ever read the Urban Renewal Plan for Block D, Rich, 29 tr. 2942.

"(7 qq) The garage was designed so that parkers 'wouldn't duplicate walking distances' to Pogue's department store, Rich, 29 tr. 2928; but shoppers going to plaintiffs' places of business are forced to duplicate over a city block of walking distances. Rich, 29 tr. 2962. Certainly, if a major 'generator,' Rich, 29 tr. 2942, would be hurt by duplicating walking distances, so would a minor one.

"(7 tt) [omitted]

"(b) *By permitting the change in the location of the Pogue garage to the north side of Fourth Street without procuring the approval of the Working Review Committee of the Central Business District*:

"(9 a) The Urban Design Review Board, not the Central Business District Working Review Committee, reviewed the schematic drawings submitted by defendant Cincinnati Redevelopment Corporation to the City of Cincinnati for the construction of the Pogue garage in Block D; Kory, 26 tr. 2676-2678; pl. exh. E-11.

"(9 b) The Central Business District Working Review Committee, which had previously approved the plans and recommended that the garage facility for Block D should be located on Elm Street between Fourth Street and Fifth Street, with an arcade to Race Street and Fifth Street and with pedestrian access to and from Elm Street, Fifth Street and Fourth Street, as illustrated in pl. exh. A-1 (Vol.

1, 'The Plan for Downtown Cincinnati'), page 38, as well as the pictorial representations on page 256 of pl. exh. A-2-b, being Vol. III of 'The Plan for Downtown Cincinnati,' being the documentation for the Urban Renewal Plan as illustrated by the Urban Design Plan, was not convened nor given the opportunity to review or approve, and did not approve, the change in location and plans for said garage from Elm Street to Fourth Street, with pedestrian access limited exclusively to Race Street.

"(9 c) The Central Business District Working Review Committee was a select committee appointed by the City Manager of the City of Cincinnati to work out the details of the Urban Renewal Plan for the Central Business District. The Urban Design Review Board was a three-man committee appointed by the City Manager, made up of a representative of the Urban Development Department of the City, a representative of the redeveloper, and an architect, which review the plans submitted by the redeveloper to determine whether they complied with the Urban Renewal Plan, as illustrated by the Urban Design Plan. Kory, 4 tr. 315.

"(c) *By failing to procure a reappraisal of Block D after approving plans for the Pogue garage exclusively benefiting Pogue's division of Associated Dry Goods Corporation*:

"(9 d) Said garage was designed by Richard C. Rich, an architect retained by Associated Dry Goods Corporation and paid through Cincinnati Redevelopment Corporation; Rich, 29 tr. 2915; which architect designed the aforesaid garage exclusively to benefit Pogue's and was given a free hand to do so; see Rich, 29 tr. 2916; and said garage, in fact, is designed to exclusively benefit Pogue's. See Corey, 12 tr. 1150; MacConnell, 21 tr. 2163.

"(9 e) Although the Cincinnati Redevelopment Cor-

poration's bid for Block D, pl. exh. A-28, included 'the future office space may be developed on this portion of the block,' plans for the garage, as approved by the City, and the garage itself as construed, do not provide for or contemplate the addition of office space, and the structure itself would not accommodate same. MacConnell, 21 tr. 2169.

"(9 f) The newspaper article, based upon information provided by the Department of Urban Development of the City of Cincinnati, dated December 9, 1965, pl. exh. H-19, indicated that the office tower to be constructed in Block D was not to be built until 1970 or 1971, so that same would not compete with the office building that was to be construed in Block A.

"(9 g) The proposed parcelization of Block D, in accordance with the property plat published by the Department of Urban Development of the City of Cincinnati, dated March 18, 1965, and attached to the bidding documents submitted to proposed developers for Block D indicated that the parking garage was to be along Elm Street between Fourth and Fifth, and an office tower along Fourth Street between Race and Elm. Pl. exh. F-12.

"(9 h) The bid of Cincinnati Redevelopment Corporation for Block D indicated that it proposed to build a garage along the north side of Fourth Street, between Race and Elm, which included the statement: 'future office space may be developed on this portion of the block,' Pl. exh. A-28.

"(9 i) The summary of the bids and recommendation to the City Council from the City Manager and the Department of Urban Development of the City of Cincinnati, included in pl. exh. A-5 and F-16, disclosed that a shoppers garage was to be the first structure built in Block D and was to be located along the north side of Fourth Street, between

Race and Elm Street; and there was no reference in same to office space.

"(9j) No re-use appraisal was obtained by the City of Cincinnati for Block D before, at, or after the acceptance of the bid by the City of Cincinnati, which relieved the redeveloper from the obligation of providing office space in Block D 'oriented to Fourth Street office core,' and construction of an underground truck terminal. See Urban Renewal Plan, pl. exh. A-3.

"(9k) The City of Cincinnati should have obtained a re-use appraisal for Block D after it decided to relieve the redeveloper of the obligation of constructing an office project in Block D oriented to Fourth Street and of constructing an underground truck terminal. See MacConnell, 21 tr. 2176.

"(9l) Nor was a re-use appraisal obtained by the City of Cincinnati when it approved the plans for the Pogue garage admittedly designed by the architect to benefit Pogue's exclusively.

"(d) *By approving the plans for said Pogue garage when same did not conform to the alleged Urban Renewal Plan as illustrated by the Urban Design Plan.*

"(9m) The redevelopment contract between the City of Cincinnati as the legal public agency (LPA) and Cincinnati Redevelopment Corporation, dated August 19, 1965, being pl. exh. A-5, provides, at page 14 thereof, that the schematic plans to be submitted by the redeveloper 'shall conform to the Urban Renewal Plan as illustrated by the Urban Design Plan,' and at page 15, provides that such schematic plans shall be approved 'if it conforms to the Urban Renewal Plan as illustrated by the Urban Design Plan;' at page 16, of such contract, the redeveloper is obligated to submit preliminary plans for the development of each parcel 'which shall con-

form to the Urban Renewal Plan as illustrated by the Urban Design Plan, 'and at page 17, such preliminary plan shall be approved 'if it conforms to the Urban Renewal Plan as illustrated by the Design Plan and the approved schematic plan.' Said redevelopment contract also provides, at page 19, that among public improvements to be accomplished by the City as a local public agency, there is included: '1. Widening of Fourth Street roadway between Race Street and Elm Street to provide an additional traffic lane for the proposed parking garage in Tract D.'

"(9 n) The schematic plans submitted by the defendant Cincinnati Redevelopment Corporation to the City in December, 1965, and approved by the City, according to Mr. Kory, 6 tr. 571, were changed to include scissors ramps in Fourth Street, which would require the narrowing of Fourth Street to a 40-foot traveled portion, and the granting of easements to said redeveloper by the City so that said ramps could be placed in the traveled portion of Fourth Street; and the preliminary plans disclosed the foregoing and were approved by the City of Cincinnati in spite of the fact that the Urban Renewal Plan for Block D specifically provided that Fourth Street should be widened between Race and Elm to a 50-foot traveled portion between curb and curb. See Urban Renewal Plan, pl. exh. A-3.

"(9 o) The City Planning Commission first considered the proposed change in the Urban Design Plan to narrow Fourth Street to a 40-foot right-of-way at its meeting in September, 1966 (September 23, 1966), following the filing of this action, after the real estate involved had been conveyed to the redeveloper, and after the Building Permit for the garage had been issued by the City. Pl. exh. E-35.

"(9 p) The City Planning Commission approved the proposed change in the Urban Design Plan

illustrating the Urban Renewal Plan to narrow Fourth Street from a 50-foot street to a 40-foot street between Race and Elm Street by a divided vote on September 30, 1966; however, if the Chairman of the Central Business District Working Review Committee and the representative of the City Manager, Mr. Arthur D. Bird, had not voted in favor of the change, the change would not have been approved by the City Planning Commission. Pl. exh. A-31.

"(9q) The City Council of the City of Cincinnati did not approve the amendment to the Urban Design Plan illustrating the Urban Renewal Plan changing the width of Fourth Street from a 50-foot street between Race and Elm Streets to a 40-foot street until after January 17, 1967. See pl. exh. A-20.

"(e) *By keeping the plans for the said Pogue garage secret until after the adoption of ordinances providing for the ramps on Fourth Street*:

[Paragraphs (9r), (9s), (9t) and (9u) are incorporated at pages 8 and 9 of this opinion, *q.v.*]

"(f) *By failing to give notice . . . to the plaintiffs of the vacation proceedings, being Ordinances 147-1966, 148-1966, and 149-1966, in violation of Chapter 723 of the Ohio Revised Code*:

"(9v) It was admitted by the City officials that notice was not given to the plaintiffs of the vacation of the north side of Fourth Street between Race and Elm and there were no public hearings held by the Cincinnati Planning Commission or the City Council of Cincinnati at which citizens were notified to appear and to present their views concerning the adoption of the vacation ordinances passed on April 20, 1966, by the City Council of the City of Cincinnati. See McClain, 2 tr. 133; pl. exh. E-28, Plan-

ning Commission Minutes of April 15, 1966; pl. exh. E-38, Calendar of City Council, April 20, 1966. (Stipulated by defendants, 9 tr. 847.)

"(23 b) The City Solicitor of the City of Cincinnati at the time of the conveyance of said real estate to defendant Cincinnati Redevelopment Corporation by letter dated July 1, 1966, stated to the Lawyers Title Insurance Co., which guaranteed the title of said real estate:

> 'Pursuant to our telephone conversation dated July 1, 1966, the City of Cincinnati will, if decreed by a court of competent jurisdiction, go through a procedure of vacating the portions of Race, Elm and 4th Streets involved in the transfer to Cincinnati Redevelopment Corporation on July 1, 1966, and give the necessary notice to the owners abutting the opposite sides of the streets.' Pl. exh. E-30.

"(23 c) On January 18, 1967, the City Manager of Cincinnati, William C. Wichman; City Solicitor, William A. McClain; and Director of the Department of Urban Development, J. V. Allen, assured Cincinnati Redevelopment Corporation that the City would defend this litigation and that the City would 'take appropriate action to re-vacate or appropriate the areas comprising the easements for ingress and egress in order to provide Cincinnati Redevelopment Corporation with good and sufficient easements for the purpose intended.' Pl. exh. B-1.

"(23 d) Plaintiffs Gibson & Perin Company; J. & L. Realty, *et al.*, Roeper, Hanson & Newman Co.; Hawley Todd, Trustee for Gibson & Perin Building Company; Aldan Company; and Nanbil, Inc., were the owners of real estate on the south side of Fourth Street from Race Street west and opposite the development of the Pogue garage in Block D. See Stipulation 13 tr. 1223 and pl. exh. B-13. • • •

"(23 e) [omitted]

"(23 f) The installation of the ramps at Fourth Street was and is detrimental to the public interest, Gordon Rich, 6 tr. 530; Oelerich, 21 tr. 2171; MacConnell, ... tr. .....

"(23 g) Defendant Cincinnati Redevelopment Corporation went ahead with the construction of the Pogue garage in the face of complaints of the plaintiffs challenging the legality of the vacation proceedings in Fourth Street, relying on the Title Insurance policy provided by the City of Cincinnati for said defendant's protection, in the event such proceedings were held to be void. Brooks, 29 tr. 2976.

"(g) *By conveying the real estate to the redeveloper almost secretly after giving some of the plaintiffs the impression it would not do before a certain date.*

"(9 w) At the meeting of June 29, 1966, in the office of the City Manager, he [the City Manager] assured the plaintiffs that the property on which the garage was to be built would not be conveyed to the redeveloper until after July 4, 1966. See Lowenthal, 9 tr. 855; Karp, 10 tr. 989; Gillman, 19 tr. 1904; Gorodesky, 11 tr. 1060; Perin, 16 tr. 1561; Joseph, 17 tr. 1672; Todd, 30 tr. 3070; Spiegel, 30 tr. 3071 (transcript erroneously refers to 'Leach' when it should read 'Spiegel'); Guy, 30 tr. 3069.

"(9 x) Plaintiffs through counsel apprised City Council in writing at the June 29, 1966, meeting of City Council concerning their complaints about the Pogue garage; and City Council referred the matter to the City Manager at said meeting for report. See pl. exh. H-3 and E-32; Gradison, 6 tr. 508.

"(9 y) The City Manager, as well as the Director and Deputy Director of the Department of Urban Renewal, knew at the time that they arranged for

the conveyance of the real estate to the defendant Cincinnati Redevelopment Corporation that plaintiffs' had complained to City Council about such matter and that City Council had referred the matter to the City Manager for consideration. See Kory, 27 tr. 2729.

"(9 z) The real estate was conveyed to the redeveloper on July 1, 1966 * * * without any of the attendant publicity that ordinarily accompanies the sale of urban renewal property. See McClain, 2 tr. 124.

"(h) *By issuing the building permit to the redeveloper, defendant Cincinnati Redevelopment Corporation, with full knowledge of plaintiffs' complaints and* [*knowledge*] *that the plans for said garage did not conform to the Urban Renewal Plan as illustrated by the Urban Design Plan*:

"(9 aa) The building permit for the garage was issued by the defendant City of Cincinnati to the defendant Cincinnati Redevelopment Corporation on July 7, 1966. See pl. exh. H-11.

"(9 bb) This action was filed on July 2, 1966. See District Court docket.

"(9 cc) See findings of fact (9m) through (9q) [at pages 20-21 of this opinion].

"(18 v) See findings of fact concerning the conveyance of the real estate (9w) through (9z) [at pages 23 and 24 of this opinion].

"(18 w) See findings of fact that the plans for the garage did not conform to the Urban Renewal Plan as illustrated by the Urban Design Plan (9m) through (9q) [at pages 20-21 of this opinion].

"(18 x) The City officials after having been advised by the plaintiffs at the meetings of June 28 and

June 29, 1966, of their complaints concerning the design of Pogue's garage, and the fact that the design of such garage did not comply with the Urban Renewal Plan, nevertheless deliberately conveyed the real estate to the Cincinnati Redevelopment Corporation. Kory, 27 tr. 2719, 2720.

"(18 y) The City officials, in spite of being apprised of plaintiffs' complaints that the plans for the aforesaid garage did not comply with the Urban Renewal Plan and that said garage discriminated against them unfairly, deliberately issued the building permit to the Cincinnati Redevelopment Corporation for the construction of the garage in accordance with plans which, on their face, did not conform to the Urban Renewal Plan as illustrated by the Urban Design Plan. Pl. exh. H-11.

"(i) *By misleading the Urban Renewal Administration in Washington, D. C., that certain matters were being undertaken to alleviate plaintiff's complaints, in fact, such was not the case:*

"(9 dd) The City Manager, prior to August 3, 1966, advised the Department of Urban Renewal of the HHFA in Washington, D.C., that the City was negotiating design changes with the redeveloper which would take care of the complaints of plaintiffs (see pl. exh. D-3), when, at the same time, the City Manager advised the City Council of Cincinnati, on August 3, 1966, that, so long as plaintiffs' lawsuit was pending between the plaintiffs and the City of Cincinnati, no negotiations could be pursued. See pl. exh. G-32.

"(9 ee) Defendant Associated Dry Goods Corporation and its Pogue division did not agree to substitute small tenants along the north side of Fourth Street west of Race Street. See Condon, 14 tr. 1416.

"(9 ff) Defendant Associated Dry Goods Corpo-

ration and its Pogue division did not agree to redesign the fire exit on Fourth Street to make it more attractive for pedestrians, or agree to set aside space in the garage on the second floor near the fire escape exit for those shoppers seeking to shop on Fourth Street west of Race. See Condon, 14 tr. 14-16; Brooks, 21 tr. 2096, 2097.

"(9 gg) The City of Cincinnati did not agree to erect a sheltered crosswalk across Fourth Street at the fire exit; and when requested by certain of the plaintiffs that a crosswalk be installed on Fourth Street between Race and Elm Street, the City of Cincinnati declined to do so. See young, 30 tr. 29-98; pl. exh. E-41.

"(9 hh) The City did not begin immediate implementation of the Fourth Street beautification program with particular reference to Fourth Street from Race Street to Elm Street intersections. See Kory, 26 tr. 2685.

"(9 ii) The City has not completed installation of lights on the north side of Fourth Street between Race and Elm Streets, as of the commencement of the trial (see Kory, 26 tr. 2687), even though one of the plaintiffs had requested in writing that the City do so. Pl. exh. L-1.

"(9 jj) Although the City had budgeted certain funds for street furniture and signing, none of said funds has been devoted to the area on Fourth Street on or between Race Street and Elm Street. See Corey, 12 tr. 1161, concerning temporary signing; and Kory, 26 tr. 2686, concerning signing, street furniture and the level of lighting.

"(9 kk) [omitted]

"(9 ll) At the meeting of the Central Business District Working Review Committee held on Thursday, May 11, 1967, in the First National Bank Building, for the purpose of deciding whether the second

level concourse should be extended south from the elevator tower of the Pogue garage on Race Street to Fourth Street; and, secondly, if so, whether said second level concourse should extend down the east side of Race Street or the west side of Race Street and terminate either in the southwestern corner of the intersection of Fourth and Race Streets or the southeastern corner of said intersection, it was the opinion of those present that the second level concourse should proceed south to the south side of Fourth Street along Race Street. Pl. exh. C-1.

"(9 mm) At said meeting, Mr. Allen Vogeler, President of the 'Newly Reconstituted Fourth Street Association,' stated that it was the decision of his organization 'that it is imperative that the walkway be extended on Race Street to cross Fourth Street * * *' and the H. & S. Pogue Co. division of Associated Dry Goods Corporation is a member of the said Fourth Street Association. Pl. exh. C-1, page 17.

"(9 nn) The said H. & S. Pogue Company, however, abstained from voting in the Fourth Street Association upon the issue about which side of Race Street the walkway should be extended down to the south side of Fourth Street. Pl. exh. C-1, page 17.

"(9 oo) At said meeting on May 11, 1967, William A. Mitchell, 'formerly Central Trust Co., now retired' (pl. exh. C-1, page 11), without first disclosing that he was a director of the defendant Associated Dry Goods Corporation, declared his opposition to the extension of the second level concourse system to the south side of Fourth Street from the Pogue elevator tower, and only acknowledged his connection with Associated Dry Goods Corporation upon being challenged by counsel for plaintiffs. The opposition of Mitchell to the extension of said walkway to the south side of Fourth Street, together with the threat of a lawsuit by Mr. A. B. Closson, Jr., who was opposed to the walk-

way being extended down the west side of Race Street but who had indicated previously that he was in favor of same being extended to Fourth Street, but on the east side of Race Street, and the opposition of Mr. Condon, president of H. & S. Pogue division, as expressed in his letter to Mr. Willard D. Gradison, Jr., of May 12, 1967 (see pl. exh. G-55), provided sufficient impetus to block the extension of said walkway to Fourth Street from the elevator tower of Pogue's garage. Kory, 8 tr. 790-800.

"(j) *By never consulting or permitting plaintiffs to participate in the design of the garage in Block D as presently designed*:

"(18 a) The said garage was designed exclusively for the benefit of Pogue's according to the architect who designed same, Richard C. Rich, and he was given 'a free hand' to do so. See Rich, 29 tr. 2916.

"(18 b) No consideration was given to the effect of the design of the ramps on Fourth Street on the property and businesses of the plaintiffs along the south side of Fourth Street west of Race Street by the defendants' architect. Rich, 29 tr. 2959, 2961.

"(18 c) No change in the design of the garage was made after the City officials and the officials of the defendant Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation were apprised of plaintiffs' complaints concerning same. Brooks, 21 tr. 2097.

"(k) [omitted]

"(18 d) [omitted]

"(18 e) [omitted]

"(18 f) [omitted]

"(l) *By permitting a material modification of the 'intent and balance' of the design of the Urban Renewal Plan for Block D without conducting the necessary public hearing and legislative action.* See findings of fact (18j) through (18u) [pages 6, 7, 8 of this opinion].

"(m) [omitted]

"(24 a) [omitted]

"(24 b) . [omitted]

Consideration of this case included inquiry as to whether or not it is feasible to remove the ramps on Fourth Street and have Elm Street used for access to the garage. It is not feasible (tr. 2919). In the first place the architect indicated (and it is not controverted) that there is not sufficient capacity on Elm Street and the two other exists to handle the garage. In the second place an entry on Elm Street would not serve part of the building, because the garage is actually two garages in one. Alternate floors are served by the Fourth Street system and confining people on exit after leaving the cashier to one short ramp to disburse on Elm Street or cross to the north would be bad. The major exit for the garage is via ramp on Fourth Street (tr. 2920).

Consideration was also given to the question of whether one or two elevators should be ordered. The architect was of the view that one elevator would be of little value, because a garage elevator stops at most floors and would be too slow to be of much value. Another witness estimated the cost of an elevator at $60,000, but the architect was not sure, because he did not know what, if any, remedial work would have to be done to the structure, and he indicated that at times elevator costs have gone as high as $175,000 for one elevator, including all the remedial work plus the elevator shaft (tr. 2921).

Of course, it is unthinkable to destroy the garage and there is no reason to disbelieve the opinion of the architect that

taking the ramps down would do just that (tr. 2924). There are 1200 spaces in the garage, and for that many good flowing entrances and good flowing exists are needed (tr. 2924).

With the benefit of 20-20 hindsight, it appears that the inclusion in an urban renewal project of a garage such as this served by scissors ramps across the street from valuable property is impermissible *per se*. From the massive evidence offered in this case, the conclusion emerges that there is no way that such a structure can be kept from having a severe detrimental effect on valuable property across the street from such project, whose highest and best use is for retail outlets and most of which is devoted to such use.

As heretofore noted, the defendants gave no thought to the effect the design of the garage might have on these properties. Mr. Brooks of the Developer confirmed that the City was in a hurry, Cincinnati Redevelopment Corporation was in a hurry to comply with the client's wish, and the contract. The architect's instructions were ". . . to design the best garage possible for Pogue's" (tr. 2916). The elevators were put where they are on Race Street because the architect was designing a building to satisfy the major demand of Pogue's, and in his planning he always puts the elevator in a direct line with the bulk of the parking with the major generators, so as not to duplicate walking distances (tr. 2927-2928). The record shows that "no consideration was given in the design to the effect on the plaintiffs" (tr. 2936).

It may be that an adequate elevator shaft can be constructed in the open court. At least the architect said he saw no reason why this could not be done (tr. 2958-59).

It is in view of all this that the Court has concluded the defendants must submit a plan to remedy the situation, and, if the equitable relief which the Court finds due cannot be fashioned by the approval and execution of such a plan, damages should be assessed as an alternative in an amount to be fixed by the Court. In reaching this result the Court has relied on a number of authorities. These will be discussed next.

CONCLUSIONS OF LAW – FOURTH CAUSE OF ACTION – SUMMARY

In general, the Court's law conclusions are as follows:

First, there is no question about jurisdiction (*infra*, page 55). There is, however, a serious question about standing (*infra*, pages 55 to 63). We conclude that the plaintiffs have standing. In fact, the plaintiffs are the only ones who are available to challenge the propriety of the implementation of the urban renewal plan for the block in question. If the plan had not been implemented (*i.e.*, the building not constructed and the land not condemned) the original owners of the south half of Block D could have successfully enjoined the appropriation of their land for private purposes, if it had been known then that the plan called for the construction of a single-purpose garage built to the specifications of Pogue's.

We have further concluded that plaintiffs have a cause of action for equitable relief; and that the extreme circumstances call for the affirmative order to install elevators, improve the firetower, pay attorney fees and expenses. We conclude it would be meaningless to simply order a vindication of procedural rights such as ordered in other successful challenges to urban renewal plans.

We pass to the particulars.

JURISDICTION AND STANDING

Jurisdiction is asserted under the Fourteenth Amendment of the United States Constitution, 42 U.S.C., §§ 1450, *et seq.*, 28 U.S.C., §§ 1331, 1343 and 42 U.S.C., § 1983. Jurisdiction of the fourth cause of action is also asserted under pendent jurisdiction. Jurisdiction is not contested. The Court has jurisdiction.

Standing is contested and merits full discussion (even if we accept the case under pendent jurisdiction, because the discussion at least ties in to the discussion of whether the

plaintiffs have a state cause of action, *i.e.*, whether any legal wrong was committed for which the requested relief can be granted).

We begin by noting that in their fourth cause of action the plaintiffs attempt to raise the following issues:

> "(1) Whether the development within Block D of said CBD core project complies with the alleged Urban Renewal Plan;
>
> "(2) Whether, in fact, the development of Block D of said CBD core project Urban Renewal Plan constitutes a material change in the Urban Renewal Plan requiring legislative action on the part of the City as the local public agency;
>
> "(3) Whether plaintiffs have been denied equal protection of the laws and due process under the Fourteenth Amendment of The Federal Constitution in the implementation of the Urban Renewal Plan for Block D in the CBD core project" (plaintiffs' proposed findings of fact and conclusions of law, foreword, page 3).

Defendants have challenged plaintiffs' standing to assert the above questions, while plaintiffs maintain that they have standing pursuant to each of the following four theories:

1. Under The Administrative Procedure Act;
2. As federal taxpayers;
3. Because they have a personal stake in the outcome of the controversy; and
4. Under the "Private Attorney General" theory.

Before turning to the specific questions presented, it is in order to observe again that the case is not like any others cited or discovered through our own research. Most all of such other cases involve contemplated urban renewal action. This one involves a situation where the structure in question has already been completed. Then too, urban renewal litigation is a relatively new field, and that lends importance to the

determination of whether or not the plaintiffs do have standing. Though urban renewal litigation is a relatively new field, we are not without guidance, and in discussing the cases which provide guidance to an appreciation of standing and related concepts, we find a good starting point to be the following from *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, at 929 (2 Cir., 1968):

> "We cannot doubt the necessity of discretionary decision making in urban renewal planning. This necessity would render unfit for judicial decisions many questions concerning urban renewal (citing cases). This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary with due regard to the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal."

In our consideration we have found it helpful to distinguish as far as possible between the concepts of standing and justiciability. A comprehensive discussion of those distinctions is contained in the Supreme Court's relatively recent decision in *Flast* v. *Cohen*, 392 U.S. 83 (1967). They are also the subject of discussion in the Supreme Court's most recent pronouncement on the subject, *Data Processing Service* v. *Camp*, 397 U.S. 150 (1969), where the Court noted, at pages 151-152-153:

> "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' As we recently stated in *Flast* v. *Cohen*, 392 U.S. 83, 101, '[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated

> will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast* was a *taxpayer's* suit. The present is a *competitor's* suit. And while the two have the same Article III starting point, they do not necessarily track one another.
>
> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . .
>
> ". . . The Court [of Appeals] denied the competitors' standing, holding that they did not have that status 'unless the right invaded is a legal right, – one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.' "

The Supreme Court said those tests were based on prior decisions of the Supreme Court, such as *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, and that such "legal interest" tests go to the merits.

The Court said, at 153:

> ". . . The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

The plaintiffs meet both tests in this case. In other words, we conclude that the challenged action has caused the plaintiffs injury in fact, economic and otherwise. We further conclude that the interest which the plaintiffs seek to protect is arguably within the zone of interest to be protected by the constitutional guarantee and the statutes in question (42 U.S.C., §§ 1420, *et seq.*).

We have also concluded that the plaintiffs have standing because they have a personal stake in the outcome of the controversy and under the "private attorneys general" theory,

though we cannot agree that they have standing under the Administrative Procedure Act or as federal taxpayers.

We feel that reliance on APA is misplaced. In pertinent part the Act provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, with-ing the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C., § 702.

Judicial review appears to be premised upon agency action. Under the Act an agency is defined as:

> ". . . each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ." 5 U.S.C., § 701(b)(1).

None of the defendants in this case fit the above description. At one time there were certain federal officials (the Regional Director of Urban Renewal and the Secretary of the Department of Housing and Urban Development) who would have been representative of an agency and could thus arguably have served as a basis for a judicial review under APA. However, they were voluntarily dismissed by the plaintiffs. *Cf. United Publishing & Printing Corp.* v. *Horan,* 268 F. Supp. 948, 950 (D. Conn., 1967).

The gist of the plaintiffs' APA standing theory appears to be that the defendant, The City of Cincinnati, is an agent of the Department of Housing and Urban Development (HUD), due to the fact that it is the local public agency under the Urban Renewal Act (42 U.S.C., §§ 1450, *et seq.*) and thus the Act is operative and accords the plaintiffs standing. We have not been cited to any case supporting this position, nor have we discovered any. Neither has it been established that any principal-agent relation in fact exists between the City and HUD. Furthermore, it has not been established that, in performing the acts complained of, the City was acting within the scope of any authority it may have had or that such actions were ratified by HUD.

As to plaintiffs' claim that they have standing as taxpayers, under *Flast, supra,* a logical nexus must be established between the status asserted and the claim sought to be adjudicated. We conclude plaintiffs have failed to establish such a nexus. Plaintiffs have not asserted the unconstitutionality of an exercise of congressional power under the Standing and Taxing Clause of Article I, Section 8 of the Constitution. Plaintiffs have not even challenged a congressional enactment. At best they are attacking actions taken pursuant to a congressional enactment. Plaintiffs have thus failed to satisfy the tests to determine entitlement of standing under *Flast.*

Plaintiffs' assertion that they have standing because they have a personal stake in the outcome is premised on *Norwalk, supra.* Although that case dealt with a different aspect of urban renewal than we have in the instant case, it did set forth the relevant test for standing, namely, whether plaintiffs can show that they have a personal stake in the outcome of the litigation. *Norwalk, supra,* at pages 926-927. As stated by the Court at that point: "The Courts will not . . . entertain a suit by one who does not have some personal stake in the outcome of the litigation" (citations omitted). From this it is clear that "the personal stake" criteria is the heart of standing.

Plaintiffs possess the requisite "personal stake" which is needed to form an adversary interest to insure the proper presentation of the issues before the Court. The allegations in the third amended complaint and the testimony show beyond question that the economic interests of the plaintiffs have been, and, unless plaintiffs get the relief they request, will in the future be adversely affected by the defendants' actions.

For example, it is alleged and proved that some of the plaintiffs were forced to move from the north side of Fourth Street or from Race Street near Fourth Street under threat of condemnation and were counseled by City officials to resettle on the south side of Fourth Street between Race and Elm Streets in the expectation that the north side of Fourth Street

would be redeveloped for retail purposes. Other plaintiffs remodeled or renovated their premises (on the south side of Fourth Street) because of similar expectations about the development of Block D induced by the representations of City officials. Also, as noted herein, the evidence has been overwhelming that the construction and operation of the single-purpose Pogue's garage has had a detrimental effect on businesses and properties on the south side of Fourth Street. Furthermore, as in *Norwalk, supra,* the plaintiffs in this action have alleged and proved that they were subjected to the deprivation of immediate and personal rights, namely, the right to due process and the right to equal protection of the laws.

It is in order to extend this discussion to explain why the Court has concluded plaintiffs have standing under the "private attorneys general" theory. That theory provides for standing under two circumstances:

> "(1) When the plaintiffs are citizens of the area and their direct interests are to be affected . . . and
>
> (2) When the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest in the area in controversy." *South Hill Neighborhood Association* v. *Romney,* 421 F. 2d 454, Appendix A, at 461 (6 Cir., 1969).

From what was said in connection with the plaintiffs' "personal stake" contention, it is clear that plaintiffs meet the test as "private attorneys general" under the test suggested above.

We repeat that in reaching the foregoing conclusions we have been mindful that, in determining standing, it is important to distinguish between the concepts of standing and justiciability. Also, we have reviewed the facts in the light of the comprehensive discussion of those distinctions contained in *Flast, supra.*

Justiciability relates to limitations placed upon the federal courts by the "cases and controversies" doctrine of Article III

of the Constitution. *Flast* teaches that two tests must be met before an issue may be found to be justiciable. First, it must be shown that the issue has been traditionally assigned to the judiciary for resolution instead of one of the other two branches of government; and, secondly, it must also be established that the issue is one which will be presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. *Flast, supra,* at pages 94-95.

Hence, no justiciable controversy is presented when the party seeks adjudication of a political question, asks an advisory opinion, or presents a mooted question, or does not have standing to maintain the action. *Flast, supra,* at page 95.

Standing differs from justiciability in that it does not involve a consideration of whether or not there is improper judicial intervention into areas committed to one of the other two branches of the Federal Government. On the other hand, standing is similar to the concept of justiciability because, with reference to Article III limitations, standing deals with:

> ". . . whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast, supra,* at page 101.

In determining whether a particular party has standing, the primary focus is on the party presenting the issue and not on the broader question of whether or not the issue itself is justiciable.

> "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue, and not whether the issue itself is justiciable." *Flast, supra,* at pp. 99-100.

And the test to determine whether a person is a "proper party" to seek adjudication is:

> ". . . whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . .'" *Flast, supra,* at page 99, quoting from *Baker* v. *Carr,* 369 U.S. 186, 204 (1961).

As we understand it, the defendants only challenge the plaintiffs' standing and make no contention that there is a separation of powers problem and hence a question regarding justiciability. Even if the defendants did make such a contention, we conclude there is a justiciable controversy because we find the issues raised by the plaintiffs are ones where:

> ". . . the duty asserted can be judicially identified and its breach judicially determined, and protection for the right asserted can be judicially molded." *Baker* v. *Carr,* 369 U.S. 186, 198 (1961).

So much for jurisdiction and standing. We pass to a statement of other conclusions of law applicable to the facts in connection with the plaintiffs' fourth cause of action.

PLAINTIFFS HAVE CAUSE OF ACTION FOR EQUITABLE RELIEF

We conclude this is one of the exceptional cases in the area of urban renewal which does not lie beyond judicial cognizance. In making such determination we have kept in mind the statement in the Court's opinion in *Norwalk, supra,* that in making our inquiry we should have:

> ". . . due regard for the need for judicially discoverable and manageable standards, for resolving problems to be undertaken and with recognition of the role played by the court and coordinate branches of the Federal Government in the planning and implementation of urban renewal. See *Baker* v. *Carr,* 369 U.S. 186, at 208, 217." *Norwalk Core* v. *Norwalk Redevelopment Agency, supra,* page 929.

We have also had due regard for the further statement in said opinion (page 930) that:

> "An affirmative form of relief such as an order requiring the construction of low income housing would, of course, be much less appropriate, since it would necessarily involve the Court in areas foreign to its experience and competence."

While an affirmative order of relief may be inappropriate in an ordinary suit challenging the plan, such an affirmative order is appropriate where the plaintiffs are confronted with a fait accompli and the extreme facts present in this case.

Plaintiffs concede that their case is not one where "property owners having property adjacent to an urban renewal project seek to maintain an action under the Fifth and Fourteenth Amendments of the Federal Constitution for depreciation in value by reason of the establishment of the project." *Woodland Market Realty Company* v. *City of Cleveland,* 426 F. 2d 955 (6 Cir., 1970), and plaintiffs also urge that their case is *not* one where "actions were done in the proper exercise of government powers. . . ." *Id.*

Plaintiffs say that their case is one where the action of the public officials in the adoption and implementation of changes in the urban renewal plan constitutes an unlawful and unconstitutional exercise of governmental power. We agree.

In this connection we have taken note of *Jarrett* v. *Norfolk Redevelopment and Housing Au.,* 169 F. 2d 409 (4 Cir., 1948). That was an action to have rent increases declared invalid as violative of state and federal statutes and contract between defendant and federal public housing authority. It is pertinent because of what Judge Parker said after noting that the fixing of rentals was entrusted by law to the discretion of the defendant authority – not to the courts. It was as follows:

> "The courts have no more power to interfere with the exercise of this discretion than with the discretion vested in a public service commission to fix rates. Only where

> the authority has transcended its legal powers, violated rules of law or abused its discretion may the courts intervene." *Jarrett, supra,* at 411.

In the consideration of the case we have recognized that we should not only not take cognizance, but should deny standing to citizens who simply challenge the choice made by public authorities between different and competing public uses. *Harrison-Halsted Com. Group* v. *Housing & Home Finance A.*, 310 F. 2d 99, 105 (1962). As pointed out by the Court there:

> The Legislature, through its lawfully created agencies, rather than 'interested citizens,' is the guardian of the public needs to be served by social legislation."

See also, *Berman* v. *Parker,* 348 U.S. 26 (1954). In *Berman,* as noted in *Harrison-Halsted, supra,* at 105, the Court said: "We do not sit to determine whether a particular . . . project is or is not desirable." And the further statement by the Court as to the role of the judiciary in such cases:

> "In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the State legislating concerning local affairs . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Berman* v. *Parker, supra,* at 32.

In our consideration of the case we have also taken note of the fact that the purpose of the Urban Renewal Act can properly be accomplished by the private use of property (42 U.S.C. § 1441) and along that line it should be noted, as stated at page 3 of their proposed conclusions of law, plaintiffs ". . . are not challenging the concept of urban renewal, the constitutionality of which has long been sustained, nor are plaintiffs challenging the right of the City Council of

Cincinnati as the local public agency to establish the boundaries of an urban renewal project and adopt the urban renewal plan therefor. . . ."

What the plaintiffs do contend is that the development within Block D did not comply with the alleged urban renewal plan. They contend that the development – the garage – constituted a material change in the urban renewal plan requiring legislative action on the part of the City as the local public agency. They further contend that they were denied due process and equal protection of the laws under the Fourteenth Amendment in the implementation of the urban renewal plan for Block D (plaintiffs' proposed conclusions of law, page 4).

Of Course the Fourteenth Amendment mandates that no State shall:

> ". . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Next, we turn to the statute in question, 42 U.S.C. §§ 1441, *et seq.* As noted in *Harrison-Halsted, supra* (at page 104), this Federal Housing Act of 1949 is a subsidy statute which provides for federal grants of aid to local government units, and both Senate and House Committee Reports stated:

> "That every project assisted be a local undertaking, locally planned, locally approved, locally managed, and designed to serve local needs. . . ."

Though there is nothing in the statute to give rise to a cause of action such as the plaintiffs maintain herein, we nevertheless conclude that certain portions of such statute are pertinent to a consideration of the issues before the Court. For instance, in the congressional declaration of policy (§ 1441) it is made clear that the elimination of blighted areas is one of the objectives of the legislation.

Also this section enunciates the policy that private enterprise shall be encouraged to serve as large a part of the total

need as it can and governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need. Local public bodies are "encouraged and assisted to undertake positive programs encouraging and assisting the development of well-planned . . . redevelopment of communities. . . ."

Equally important to note in addition to the purposes of the legislation are the provisions governing requirements for loans for capital grant contracts (§ 1455). Therein it is provided in subsection (a)(iii):

> "The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that . . . (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole; . . ."

In the following subsection, it is provided:

> "When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; . . ."

This explains the presence of appropriate covenants running with the land in the quitclaim deed from the City to the Developer (px A-6-(a)).

In our view it is the spirit and tenor of these statutes which it is important to note for the purpose of this case. In other words, we do not deem it necessary to determine whether they impose a statutory obligation on the Developer and the lessees to determine whether any amendment to the plan was duly made, or whether such amendment is an unauthorized departure from the plan so as to expose them to claims for equitable relief by persons injured by such unauthorized departure. Likewise, we do not deem it necessary to determine whether the covenants running with the land included in the

deeds from the City to the Developer are contracts for the benefit of third parties so as to entitle persons in the position of the plaintiffs in this case to sue thereon in the event of an unauthorized departure from the urban renewal plan.

Further along this line, it is appropriate to note subsection (h) of § 1456 and its limitation on the Secretary not to make any loan until satisfied that the project in question will be ". . . carried out in substantial accordance with the urban renewal plan and any amendments thereto. . . ."

If this case involved a review of agency action under the Administrative Procedure Act (5 U.S.C., §§ —, *et seq.*) the Court would be empowered to review the agency's adherence to its own procedural requirements. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969). Even actions of military agencies taken in violation of their own rules and regulations are subject to judicial review. *Hollingsworth* v. *Balcom*, — F. 2d — (6 Cir., No. 20650, Apr. 14, 1971), citing *Schatten* v. *United States*, 419 F. 2d 187 (6 Cir., 1969).

In *Hollingsworth* the Court said:

> "Courts have regularly insisted that when an administrative agency, including a branch of the armed services, has established rules and regulations for its own internal procedures, these rules and regulations cannot then be ignored by them even in the exercise of discretionary authority. . . ."

We have concluded that by the same token the City of Cincinnati, as the local planning agency, had to adhere to its own rules and regulations governing the amendment of the urban renewal plan, and in that connection we adopt as our own the following proposed conclusion of law submitted by the plaintiffs:

> "Article II, Section V, of the *City Charter*, states that 'the proceedings of the council shall be public.' There is even a provision that requires council to give public notice of special meetings. Public attendance, however, does not entail public participation. Rule 44 of the

Council's *Manual of Legislative Procedure and Rules of Council,* Pl. Exh. H-9, makes it quite clear that no one has a right to address Council at one of its regular meetings without permission — permission that can be withheld quite arbitrarily. 'Persons other than members of Council, city officers and reporters of the daily press, shall not be permitted upon the floor of the Council, or to address Council, except upon introduction of the Chairman of the Law Committee and with the consent of Council.'

"There is even a provision to send special notice of a Council meeting to interested parties, but there is no provision to give the interested parties any right of rebuttal, questioning, etc. 'Whenever a board, commission or officer hears persons, organizations or delegations on any pending matter, a list of such persons shall be preserved with the documents. When Council or a committee considers such matter, the Clerk of Council shall notify such persons of such meeting.' *Manual of Legislative Procedure,* Rule 2, Improvement of General Procedure, in Pl. Exh. H-9.

"Whenever the term 'public hearing' is used as distinguished from 'public,' the emphasis of the rules seems to be that of allowing interested parties a chance to speak freely and present arguments pro and con. There is also a greater emphasis given to a regular Council meeting:

" 'Upon the receipt of the recommendation of the Planning Commission, Council shall hold a public hearing on the question of the adoption of the redevelopment plan *at which an opportunity shall be provided to all persons interested to be heard either in person or by counsel.* Notice of the time and place of such hearing shall be published in a newspaper of general circulation in the city once a week for two consecutive weeks, and such publication shall be completed not less than fifteen days after the day set for the public hearing * * *.' Code of Ordinances, 750-13, 'Council Action; Public Hearing;' reinforced in 750-23, Pl. Exh. A-9a (emphasis added).

"'Whenever the City Planning Commission • • • shall have determined upon a public hearing in connection with the adoption or rejection of such mapped street line plats, the clerk of Council shall cause to have printed a sufficient number of notices of such public hearings and shall further provide to have said notices distributed as widely as possible among the owners and residents abutting the proposed improvement.' *Rules of Council*, Miscellaneous 42-1, Pl. Exh. H-T.

"'Any committee may hold public hearing on any matter pending before the committee.' *Manual of Legislative Procedure*, Rule 4, Pl. Exh. H-9.

"'Council shall • • • fix the time and place for a public hearing in the matter of the proposed rezoning, the date of which hearing shall not be less than thirty days after the date of the notice of the time and place thereof in a newspaper of general circulation in the municipal corporation.' Pl. Exh. H-9, page 29.

"Although not dealing with a situation exactly like the one in the instant case, there is an Ohio case which defines a 'full hearing' by citing *American Jurisprudence*:

"'One in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety • • •. There is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute.' *State ex rel. Wright* v. *Morrison*, 80 Ohio Appeals 135 at page 144.

"Consequently, regular Council meetings do not meet the qualifications of being public hearings. They do not allow any interested party a right to speak up; only at Council's discretion can one speak out. It seems that the purpose of public hearings is precisely to let all interested parties speak out without restriction in an orderly fashion. Thus, even in the City Charter, the ordinances, and the rules of Council, a distinction is drawn between public hearings and open meetings.

"Moreover, nonjudicial bodies (Legislatures) must conform to the constitutional requirements of due process when acting in a way which will affect people like plaintiffs adversely.

"'Any hearing involving one's rights must conform to the standards of a fair trial and are (*sic*) subject to the protection of the general rules of fair play which govern society; and this is true whether the hearing is before a court of law, an executive, or a commission.' *Smith* v. *Mayfield Heights*, 99 Ohio Appeals 501 at page 504.

"'Due process means the right to be heard.' *State ex rel. Koegh* v. *Gilmore*, 35 O.L.A. 97 at 101.

"Even the narrowest definition of due process involves the right to be heard. 'Due process of law involves only the essential rights of notice, hearing or opportunity to be heard before a competent tribunal.' *State* v. *Edwards*, 157 Ohio State 175.

"Thus, the above standards of due process appear to apply in every type of legislative or administrative hearing from tax, zoning, etc., to immigration boards, etc.; and from local to state to federal."

In determining what law should be applied to the extreme facts in this case we find pertinent the following observation of the Court in *Yick Ho* v. *Hopkins*, 118 U.S. 356 (1886):

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . ." *Yick Ho, supra*, at 373-374.

We have taken note that the Court in *Harrison-Halsted Com. Group* v. *Housing & Home Finance A., supra*, held the action belonged in state court. That action was one for

declaratory judgment and injunction to prevent the agency from proceeding with a plan to acquire and clear, under the urban renewal program, an area for use as a university campus. As in this case jurisdiction was asserted under 28 U.S.C. § 1331 (federal question).

We gave much time and study to plaintiffs' contention that a substantial federal question is involved. We view as substantial the plaintiffs' allegations that in the process of implementing the changes to the urban renewal plan for the south half of Block D they were denied equal protection of the law and due process. While this may color their claim federal, essentially it is part of the plaintiffs' state cause of action (over which the Court has and accepts pendent jurisdiction). But we concluded that the result would be the same whether the plaintiffs' case is one over which we have pendent jurisdiction or because a federal question is presented, and, furthermore, even if it is a case over which we have pendent jurisdiction, our discussion of standing, justiciability and principles of judicial review of administrative action is pertinent.

For instance, the following statement by the Court in *Norwalk Core* v. *Norwalk Redevelopment Agency, supra,* at 926, seems pertinent to us whether the case is one over which we have pendent jurisdiction or because there is a substantial federal question:

> "It is true that courts have been reluctant to interfere with urban renewal planning. The fact that the reasons for this reluctance have been lumped together under the rubric of 'lack of standing to sue' should not be allowed to obscure the distinction, necessary albeit not altogether clear, between the propriety of allowing particular plaintiffs to bring litigation (their standing to sue) and the propriety of judicial attempts to resolve the problem which plaintiffs are attempting to bring before the court (the question of justiciability."

The same holds true of our conclusion that *Shannon* v. *United States Dept. of Housing & Urban Dev.*, 305 F. Supp.

205 (E.D. Pa., 1969) is especially important to note because, among other things, it involves an attack on a *modification* of an urban renewal plan. We realize Secretary Romney and others were defendants and they were charged with responsibility of executing the housing law and were sued in their official capacity. The Court vindicated procedural rights pursuant to *Powelton Civic Homeowners Association* v. *HUD*, 284 F. Supp. 809 (E.D.Pa., 1968), but also retained jurisdiction, and, under such retained jurisdiction, the case came on for review of an alleged abuse of discretion. The plan had been modified to the disappointment of the plaintiffs, who were businessmen and owners of property in the immediate vicinity of the proposed apartment project. In discussing whether such plaintiffs had the requisite directness of interest, the Court held that the likelihood that plaintiffs' interests would be adequately protected by persons directly affected was an irrelevant consideration. The Court said the plaintiffs were not only the logical parties to make the challenge, they were the only available ones to do so. Similarly, we conclude that the plaintiffs are not only the logical parties to make the challenge, but they are obviously the only available ones to do so.

It is significant that the Court in *Shannon, supra,* at 213, also reviewed agency action on the basis of the abuse of discretion, finding: ". . . no clear and convincing intent to preclude judicial review." This is cited only to show that in an exceptional case, reluctant though they may be to get into urban renewal matters because of the obvious need for wide latitude in the exercise of discretion by those charged with the responsibility of implementing urban renewal plans, Courts will take judicial cognizance of the case.

Along that line there are two Ohio cases which have been cited and are worthy of note. In one, which is included in the appendix because it is unreported, *Cincinnati* v. *Beaumont,* [sic] No. A-217569, Court of Common Pleas of Hamilton County, Ohio, landowners obtained an injunction against the City from obtaining their property in Block J of the Central Business

District Core Project Area to provide a truck depot benefiting Shillito's Department Store. Judge Louis J. Schneider said:

> "The authorities seem to establish the proposition that when private property is sought to be taken for public use, it must be clearly established that it will be so used. Such use should not be subject to the whims of government after the property is acquired."

In view of that there can be little doubt that the landowners in the south half of Block D, had they known that their property was being taken in order to be cleared for construction of a single-purpose garage built to the specifications and solely for the benefit of Pogue's, could have obtained an injunction against the acquisition of their land.

See also, *Stratford Motel* v. *Dayton*, — Ohio App. 2d —, wherein the Court stepped in because it viewed the City's urban renewal action under scrutiny as imposing a "death sentence" on a nearby landowner, and found the City exceeded its discretionary powers and furthermore did not prevent the recurrence of conditions of blight.

Finally, since we decide that the City, the Developer, and the lessee should not only be ordered to install elevators and improve the firetower to bring the garage into line with the urban renewal plan and to curb the blighting effect of the garage, but should pay the plaintiffs substantial attorney fees and costs incurred in connection with this litigation, and because we recall no specific request for such costs and attorney fees, we note Rule 55(c) F. R. Civ. P., which provides in part:

> ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

DAMAGES AND ATTORNEYS FEES

As stated at the outset we find no basis in law for damages except as an alternative to equitable relief.

As this indicates we concluded that we can and should retain jurisdiction to award damages in lieu of the desired equitable relief in case it develops that the granting thereof appears to be impossible or impracticable. See 30 C.J.S., Equity, § 72. See, also, 42 Am. Jur. 2d, Injunctions, §§ 305 and 306.

As stated in the conclusion at the outset, we view this case as an appropriate one for including in the equitable relief plaintiffs' substantial attorney fees and expenses. We recognize that American courts do not reimburse the victorious litigant for the full price of his victory, his attorney fees and expenses. See *Bradley* v. *Richmond School Board*, — F. Supp. — (39 U.S. L.W. 2709 (E.D. Va. 1971)), citing Goodhart, "Costs," 38 Yale L.J. 849 (1929).

As the Court pointed out in *Bradley*, at page 2709:

> "Like most generalizations in law, this rule is subject to several exemptions. The shape of these exceptions provides an example of the tensions existent in our system between two sources of legal rules: courts and legislatures. For the cases show that courts recognize a power in themselves, necessary at time (*sic*) in order to fully achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction. . . ."

As also pointed out by the Court in *Bradley*, at page 2709:

> "*Sprague* v. *Ticonic Bank*, 307 U.S. 161 (1939), establishes that counsel fees and other litigation expenses, not taxable as costs by statute, may be awarded as part of a litigant's relief. 'Allowances of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts.' 307 U.S., at 164."

We think it is self-evident that this is an "appropriate" situation within the meaning of that phrase as used above. The plaintiffs have been put to great expense because of the flagrant acts of the City, the Redeveloper, and the ultimate beneficiary, Pogue's division of Associated Dry Goods Corporation, in erecting a garage with scissors ramps across from valuable properties and businesses which has a blighting effect on such properties and businesses. This aspect of the case may be discussed further when the plaintiffs' application for fees and expenses is presented and acted on.

PENDENT JURISDICTION – WEIGHT AND SUFFICIENCY OF EVIDENCE – IRREPARABLE INJURY AND REMEDY AT LAW

We noted (*infra*, page 74) that the plaintiffs' claim in the fourth cause of action may not be cognizable in a federal court – *Harrison-Halsted, supra.* However, there can be no question but that the plaintiffs' claim under the antitrust laws is cognizable. There can be no question both claims arise out of the same group of operative facts.

> "The circumstances out of which this controversy arose clearly conform to the 'nucleus of operative facts' required for a federal court to exercise pendent jurisdiction over a claim otherwise not cognizable in federal court." *F. C. Stiles Contracting Co.* v. *Home Insurance Co.*, 431 F. 2d 917, 920 (6 Cir., 1970).

On this authority we conclude it is proper to take pendent jurisdiction over the fourth cause of action.

Furthermore, since the facts are all before the Court in connection with the plaintiffs' claim for damages for violation of the antitrust laws, it is in the interest of judicial economy and fairness to the litigants for the Court to exercise such pendent jurisdiction and permit the plaintiffs to adjudicate their entire lawsuit in this one action in federal court. *Stiles, supra.*

In connection with pendent jurisdiction we were guided also by what the Court said in *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970), to the effect that the conservation of judicial energy and avoidance of multiplicity of litigation is a common sense policy of pendent jurisdiction. There the Court held that even mootness of a constitutional question only affects the discretion and not the Court's power. The Court further indicated that a trial court does well to balance policy considerations that have spawned the doctrine of pendency and the countervailing policy of federalism. The Court recognized that insubstantiality of the federal question may be a threshold question. On that point we consider the federal question herein (the antitrust case) to be not insubstantial, and in view of *Rosado*, consider further that even if it is viewed as insubstantial that only affects the Court's discretion and not its power to hear the pendent claims.

Next, as to the weight and sufficiency of the evidence, we conclude the plaintiffs have established the essential elements of their case by clear and convincing evidence. See 43 C.J.S. Injunctions, § 192.

Furthermore, the Court concludes that the plaintiffs have no remedy at law, and that they have clearly established that they will suffer irreparable injury unless the situation is righted by an injunction.

PLAINTIFFS FAIL ON FEDERAL AND STATE ANTITRUST CLAIMS

At the conclusion of all the evidence, the City of Cincinnati was dismissed as to the antitrust causes of action because governmental action is not within the scope of federal or state antitrust law. Hence these causes of action are asserted only against the remaining defendants, H. & S. Pogue Company Division of Associated Dry Goods Corporation, Cincinnati Redevelopment Company, Adcor Realty Company, and the Morgan Guaranty Trust Company of New York.

Plaintiffs contend that the contracts for the construction and operation of the Pogue garage are contracts in restraint of trade under § 1 of the Sherman Act, 15 U.S.C. 2; and that their purpose is to prevent competition in the sale of merchandise under §§ 1331.01, *et seq.*, of the Ohio Revised Code.

Section 1 of the Sherman Act provides that every contract or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal. Section 2 provides that every person who shall monopolize or conspire with any person to monopolize any part of such trade or commerce shall be guilty of a misdemeanor and be punished by a fine not exceeding $50,000, or imprisonment not exceeding one year, or both.

Plaintiffs specifically allege that the defendants have participated in a conspiracy to construct the Pogue garage so that it benefits Pogue's exclusively even though the garage was constructed on property obtained through urban renewal, and thus exclude plaintiffs from a substantial market and suppress competition. Plaintiffs further allege that the relevant market is the market created by Pogue's garage which is defined geographically as the "dramatic elbow" at Fourth and Elm Streets, and that defendant Associated Dry Goods Corporation is monopolizing the source of demand in the relevant market through the design of its garage. The essence of plaintiffs' contentions is that the defendants have denied them access to the market created by the urban renewal garage, a market composed of shoppers who shop for goods sold by the plaintiffs and Pogue's department store.

In support of these theories plaintiffs cite *United States* v. *Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912); *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America*, 438 F. 2d 1286 (5 Cir., 1971); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F. 2d 484 (1 Cir., 1952); *American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869 (4 Cir., 1950); and *United States* v. *Tarpon Springs Sponge Exchange*, 142 F. 2d 125 (5 Cir., 1944). Plaintiffs' strongest case, *Gamco*, is readily distinguishable. In that case the defendant

corporation controlled the only wholesale produce market building in Providence, Rhode Island. This unique building was the only feasible spot for produce buyers and sellers to meet and use the necessary railroad facilities. We feel that *Gamco* is so factually different from the unique situation at bar that it does not provide support for plaintiffs' case.

The same is true of the other cases cited by the plaintiffs. In those cases the markets monopolized are product and geographical markets, not an alleged "shoppers' market" as in this case. The geographic distribution of natural resource is the paramount factor in those cases, a factor entirely missing in this case. That is, there is no natural resource such as sponges or natural gas, and no crop like tobacco involved here. The *Terminal R.R.* case involved the unification of substantially all of the railroad terminals serving St. Louis, Missouri. The facts of that case also serve to distinguish it from this situation.

Defendants have cited a more applicable decision, *Savon Gas Stations Number Six, Inc.* v. *Shell Oil Co.*, 309 F. 2d 306 (4 Cir., 1962). In this case a gasoline station owner was denied direct access from the rear of his property to the parking area of a shopping center. The plaintiff charged antitrust violations but the Court found no direct interference with his business in any fashion. There was no *per se* violation of the antitrust laws. The Court noted that the customers of the shopping center had free access to the parties' places of business by using the public street. The Court could not find an unreasonable restraint of trade within the purview of the federal statutes under those facts.

We feel that this Court does have jurisdiction under the antitrust laws, *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *Bratcher* v. *Akron Area Bd of Realtors*, 381 F. 2d 783 (6 Cir., 1967); *Otto Milk Co.* v. *United Dairy Farmers CoOp Ass'n*, 388 F. 2d 789 (3 Cir., 1967); however, we hold that plaintiffs cannot prevail on the merits of their antitrust contentions. Plaintiffs have alleged a conspiracy between the defendants to lessen competition. Without

analyzing the elements of conspiracy, we must simply say that we have found no evidence of conspiracy in this case. Actions and agreements among the defendants which are otherwise lawful cannot become the basis for a claim of conspiracy merely because opposing counsel gave notice of their opposition. There is no competition between any of the defendants. Thus, there can be no collusive agreement to fix prices, lessen competition, or any other *per se* violation of the antitrust laws in the traditional sense.

Whenever issues arise under the antitrust laws one of the most important factors is the determination of the relevant market. *Mercantile Nat'l Bank of Chicago* v. *Quest, Inc.*, 303 F. Supp. 926 (N.D. Ind., 1969). Plaintiffs allege that the relevant market in this case is the "dramatic elbow" at Fourth and Elm, and that defendant Associated Dry Goods Corporation monopolizes this relevant market. We do not agree. Plaintiffs cite no authority indicating that a parking garage or a small portion of a city can constitute a relevant market. Plaintiffs' contention would logically extend to make every parking garage a relevant market. To state this result is to expose plaintiffs' error. The relevant market is defined in terms of products and geographical area, not in terms of shoppers. *United States* v. *DuPont & Co.*, 351 U.S. 377 (1956); *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934); *Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625 (D. Kan., 1965). The relevant market is how far buyers will go to substitute one commodity for another, *i.e.*, the area of the parties' effective competition. *United States* v. *DuPont & Co., supra.* We make no finding as to what the relevant market is in this case, but we hold that it is *not* the "dramatic elbow" proposed by the plaintiffs. We have no doubt that the relevant market here is a much larger area than the plaintiffs contend. (See tr. 920, 1005, 1100, 1782, 1793, 2404-06.) *Cf., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). Thus, plain-

tiffs have failed to establish the relevant market and therefore cannot prevail in their antitrust claims.

The proposed findings of fact and conclusions of law submitted by the plaintiffs indicate that they left no stone unturned in attempting to establish the antitrust theories of their case. After exhaustive discovery and painstaking analysis of the facts discovered, they submitted testimony and many exhibits on the issue of competition between the plaintiffs and Pogue's division of Associated Dry Goods Corporation. However, in the Court's view, it is not necessary to indicate approval or disapproval of the many proposed findings of fact. The following narrative account should suffice.

The H. & S. Pogue Company, a division of Associated Dry Goods Corporation, is a large department store; the plaintiffs, on the other hand, operate a variety of small retail enterprises. Plaintiff Lowenthal's, Inc., is in the fur business. The evidence clearly established that Pogue's, while also in the fur business, deals mainly in more expensive furs than those featured by Lowenthal's (tr. 2407). There are also significant differences in the types of goods sold by the plaintiffs and Pogue's. One plaintiff is an auctioneer of second-hand goods. Pogue's sells no second-hand goods and does not conduct auctions (tr. 962, 2404).

Plaintiffs Gibson & Perin Co. and Koch Embroidery & Pleating Shop, Inc., can accurately be described as speciality stores. Gibson & Perin deals mainly in office supplies, furniture and equipment. Plaintiff Koch's main business is sporting goods and embroidery. Thus, although these plaintiffs do sell certain items also sold by Pogue's, their principal business does not compete with Pogue's (tr. 2400, 2403, 2460).

We can discern no real competition between plaintiff Pigall's French Restaurant, Inc., and Pogue's either. Plaintiff Pigall's is a nationally known gourmet restaurant (tr. 1103). It is contended that the design of the garage draws away some of Pigall's prospective luncheon customers and diverts them to Pogue's Camargo Room. The differences between the types of food offered and the respective prices of meals make any

attempt to ascertain causation and damages wholly speculative (tr. 1101, 2403).

Plaintiff Aldan Company and the owners of plaintiff Gillman Knitwear Co. own property on the south side of Fourth Street. They claim that the construction of the garage as it is presently designed has lessened the value of their properties. Plaintiff The Gilsey Shoe & Handbag Co., Inc., sells ladies shoes and handbags from its store location on Fourth Street. The business was described as a "specialty shop" (tr. 1490). As in the case of the other plaintiffs, these three plaintiffs have not stated a cause of action under the antitrust laws. After full examination of the exhibits and testimony in this case, we must conclude that real competition is minimal in the case of plaintiff Gilsey and the other plaintiffs, and there has been no proof that the products or services sold by plaintiffs are responsive to price changes in products or services sold by Pogue's. See *United States* v. *DuPont & Co.*, 351 U.S. 477 (1956).

In Count Two of their complaint plaintiffs allege that certain contracts between certain defendants violate the Ohio Valentine Act, a statute patterned after the Sherman Act. *List* v. *Burley Tobacco Growers' Co-operative Ass'n*, 114 Ohio St. 361 (1926). The Valentine Act prohibits combinations or conspiracies in restraint of trade. Ohio Rev. Code 1331.02, 1331.04. However, there is simply no proof of a conspiracy or a purpose to restrain trade, which is an essential prerequisite to liability under the Ohio monopoly laws. See, Ohio Rev. Code 1331.02, 1331.04, 1331.05, 1331.06, 1331.15.

For these reasons and the reasons already stated above, Count Two must also fail.

PLAINTIFFS FAIL ON THIRD AND FIFTH CAUSES OF ACTION

As we noted at the outset, the heart of the plaintiffs' case seemed to the Court to be the request for equitable relief on the ground of unauthorized departure from the urban re-

newal plan. As we indicated in the course of the opinion, there was doubt in our mind that this was a proper case for federal court, even though it was plugged into a claim of denial of due process and equal protection of the laws.

Even though it may not have belonged here, the case was here under pendent jurisdiction, and the Court has given the many questions involved much study. We considered it necessary to go into great detail, both as to the facts found and the law applied up to this point, to facilitate review and to adequately inform the parties of the basis of the Court's decision.

We did not think it was necessary to go into such detail in connection with plaintiffs' claim that there was a violation of state antitrust laws, and we do not feel that there is such necessity to go into detail on the plaintiffs' further state causes of action. These are based on the contention that the whole urban renewal plan is void because not legally adopted, and the street vacation proceedings (involving a portion of Fourth Street on which the ramps were eventually constructed) were also illegal because the plaintiffs were not notified thereof, and that on these theories (singly and in combination) they are entitled to equitable relief and damages.

The resolution of the case in the plaintiffs' favor on the fourth cause of action (and in the defendants' favor on the federal antitrust case) seems to make it pointless to deal with the other theories of the plaintiffs' case except in summary fashion, because none will support a grant of relief of the type which the plaintiffs seek.

Under these circumstances it strikes us that though there may not be a limit on the number of state theories a litigant may assert under pendent jurisdiction, in the interest of time there must be a limit on the discussion thereof if the plaintiffs are successful on one theory and could not possibly be on the other theories.

We should be remiss, however, if we did not recognize that counsels' preparation on these theories is just as exhaustive and competent as it was under antitrust and urban renewal. Therefore, it almost seems required to match their profes-

sional performance. But to do so would serve no useful purpose and take an inordinate amount of time.

The contention of the plaintiffs that they are entitled to equitable and monetary relief under state antitrust laws has already been discussed (*ante*, page 82). It therefore remains only to deal with the claims that relief is due because the plan was not correctly adopted and because the plaintiffs were not notified of street vacation proceedings incident to the amendment thereto.

We have concluded that the claim that the plan is void because not legally adopted is inconsistent with the claim of the plaintiffs that the plan was adopted and they are entitled to relief because they were discriminated against unfairly when the plan was changed to provide a garage solely for the benefit of Pogue's, served with ramps on Fourth Street which have a detrimental effect on plaintiffs' businesses and properties. Furthermore, we must conclude that the assertion is not timely, since it is made after the entire plan is substantially executed and therefore has been relied on by a host of people.

Lastly, we fail to see how failure to legally adopt the plan could give rise to a cause of action for damages and equitable relief of the type which the plaintiffs seek.

We likewise conclude that failure to give notice to the plaintiffs in connection with street vacation proceedings (Fourth Street, Race Street and Elm Street), though pertinent as one of the circumstances which has to be assessed in determining the fourth cause of action, does not give rise to a cause of action for legal and equitable relief of the type the plaintiffs seek – where, as in this case, the *traveled* portion of the street on which the plaintiffs' businesses and properties are located is not narrowed.

As heretofore noted (page 44), the street was narrowed from 50 to 40 feet by the vacation. However, the vacated portion was the part of the street on which the sidewalk opposite plaintiffs was located. The vacation therefore in nowise affected the easement of the property owners among the plain-

tiffs to have ingress and egress to their properties. They have no other easements or property rights in the vacated portion of the street. As this indicates, we reject the contention of the plaintiffs that they have a cause of action for invasion of easements for light, air and view.

We therefore do not deem it necessary to discuss this aspect of the plaintiffs' case, except to say there is no question but that the plaintiffs were not notified of the vacation proceedings necessary to the placement of scissors ramps on Fourth Street (opposite the properties and businesses of plaintiffs), Race Street, a passageway under the ramps, the bridge over Race Street from the garage to Pogue's, and the elevator tower on Race Street which is one terminus of the bridge (Pogue's is the other terminus). We conclude this is a pertinent fact in assessing equities in this case, but not such as to void the vacation proceedings and, *per se*, give rise to a cause of action by the plaintiffs for damages and the type of equitable relief they seek in this suit.

INSTRUCTIONS FOR JUDGMENT ENTRY

Since the conclusion was summarized at the outset, it remains only to say that an appropriate judgment entry should be prepared by plaintiffs' counsel and submitted to opposing counsel and the Court for approval. As this will serve as a prefatory statement for this decision, the entry should reflect the line-up of the parties and the last-minute changes therein. It should also reflect the nature of the case and the fact that it came on for hearing on the issues reflected in the pretrial orders, pretrial statements and supplements thereto which were made a part of the pretrial orders. It should also reflect that the case came on for hearing on the issues reflected by the third amended complaint and the answers thereto by the defendants City of Cincinnati, Morgan Guaranty Trust Company of New York, Trustee, and the joint answer of defendants, Cincinnati Redevelopment Corporation, H. & S. Pogue

Company, Inc., and Associated Dry Goods Corporation. These are appropriately tabbed in File No. 2 in this case.

Of course, the entry should show that the plaintiffs prevail on the issues made by the allegations in their fourth cause of action and the answers thereto (except as to Adcor Realty Company, Morgan Guaranty Trust Company of New York and H. & S. Pogue Company, Inc.), and that the Court orders that the defendants City of Cincinnati, Associated Dry Goods Corporation and Cincinnati Redevelopment Corporation, jointly and severally, install elevators at Fourth and Elm Streets and improve the firetower so that the garage in question will serve the area in which the plaintiffs are located. The entry should reflect that the Court retains jurisdiction for the purpose of determining the order is complied with and for the further purpose of assessing damages on the record before it as an alternative to equitable relief, if such cannot be fashioned in the circumstances. The entry should also reflect that the Court retains jurisdiction to award plaintiffs their attorney fees and expenses of suit on application therefor and a hearing thereon.

Lastly, the judgment entry should order the defendant City of Cincinnati, Associated Dry Goods Corporation, and Cincinnati Redevelopment Corporation to submit to the Court within ninety (90) days a plan in accordance with this opinion.

Costs should be taxed to defendants City of Cincinnati, Associated Dry Goods Corporation, and Cincinnati Redevelopment Corporation.

The Court thanks and compliments all counsel.

/s/ DAVID S. PORTER
United States District Judge

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-217568

CITY OF CINCINNATI,
Plaintiff,

vs.

EDITH C. BOWMAN, ET AL.,
Defendants.

No. A-217569

CITY OF CINCINNATI,
Plaintiff,

vs.

ELIZABETH R. WILLIAMS, ET AL.,
Defendants.

MEMORANDUM

SCHNEIDER, J.:

These matters were submitted to the Court on September 29, 1966, after oral argument. The Court has since received from all parties very complete briefs setting forth arguments and authorities on the questions involved. The Court has reached the conclusion that the Council of the City of Cincinnati has exceeded its extensive and liberal powers in matters of

this nature, to the extent that it has abused its discretion in appropriating all the land of defendants.

The resolution of Council, as set forth in the petitions, asserts that the taking is for a public use, to wit, Urban Renewal, for the necessary and immediate preservation of the public peace, health and safety, as follows:

1. The need of widening Sixth Street.
2. Constructing a public loading shelter for bus and automobile passengers.
3. Constructing a loading shelter for bus and automobile passengers and an interchange for the second level concourse.

The evidence discloses that at the time the resolution was adopted, plans for development of the area included "predominant" uses other than "public use".

Aside from the specific public use, namely, the need of widening Sixth Street, the resolution, the petition, and the evidence indicate that the City of Cincinnati is uncertain as to the future use of this land and is too indefinite with respect to the extent of the widening of Sixth Street proposed, the exact nature of the use of the loading platform and shelter and the loading and unloading docks, and as to the so-called interchange for the second level concourse.

The authorities seem to establish the proposition that when private property is sought to be taken for public use it must be clearly established that it will be so used. Such use should not be subject to the whims of Government after the property is acquired.

For these reasons the relief prayed for by the land owners in each case will be granted and entries may be submitted in accordance with this memorandum, with the right to plaintiff to amend.

• • •

APPEARANCES:

William A. McClain, City Solicitor and
John P. Scahill, Assistant City Solicitor,
Attorneys for Plaintiff.

Lindhorst & Dreidame,
Attorneys for Edith C. Bowman, Defendant.

Kyte, Conlan, Wulsin & Vogeler,
Attorneys for Elizabeth R. Williams, Defendant.

Beirne, Wirthlin & Manley,
Attorneys for Robert Jacobs, Defendant.

Melvin C. Rueger, Prosecuting Attorney.

February 8, 1967.

APPENDIX B

FINDINGS OF FACT RELATING TO URBAN RENEWAL THEORIES OF RECOVERY

1. ***Plaintiffs have standing to prosecute this action:***

(a) As taxpayers of the United States and owners of real estate and/or business establishments directly affected by the urban renewal development of Block D:

1 a Gibson & Perin Company, 121 West Fourth Street, Cincinnati, Ohio. Sales volume, $465,674.00. (See Pl. Exh. I-1.)

1 b Gibson & Perin Building Company, 121 West Fourth Street, Cincinnati, Ohio, real estate holding company. Value of real estate as per Mr. O. W. Perin, Jr., Vice President, $150,000.00, (16 tr. 1554). As per Mr. William H. MacConnell, expert real estate appraiser, $130,000.00, (22 tr. 2228; Pl. Exh. B-13).

1 c Gibson & Perin Building Company, Hawley Todd, Trustee, 127 West Fourth Street, Cincinnati, Ohio, real estate holding company. Value of real estate as per O. W. Perin, Jr., Vice President, $125,000.00 to $150,000.00, (16 tr. 1570). As per William H. MacConnell, expert real estate appraiser, $156,000.-00, (22 tr. 2228; Pl. Exh. B-13).

1 d Gilsey Shoe & Handbag Co., Inc., 135 West Fourth Street, Cincinnati, Ohio. Investment in business, $90,000.00, (15 tr. 1469).

1 e J & L Realty, tenant in common with Louis Lazarus, Mrs. Gordon Reis, and Lucien Lazarus, 125 West Fourth Street, Cincinnati, Ohio, real estate holding company. Value of real estate at time of sale in 1968 was $210,000.00. Joseph, (16 tr. 1634). As per William H. MacConnell, expert real estate appraiser, $210,000.00, (22 tr. 2229; Pl. Exh. B-13).

1 f Joseph Karp, 137 West Fourth Street, Cincinnati, Ohio, real estate owner. Value of real estate $75,000.00; (18 tr. 1831). As per William H. MacConnell, expert real estate appraiser, $75,000.00, (22 tr. 2229; Pl. Exh. B-13).

1 g Gilbert Karp, d.b.a. Main Auction Galleries, 137 West Fourth Street, Cincinnati, Ohio. Sales volume, $193,914.00. (See Pl. Exh. K-3).

1 h Koch Embroidery & Pleating Shop, 133 West Fourth Street, Cincinnati, Ohio. Investment in business $153,127.18. (See Pl. Exh. Q-2).

1 i Lowenthal's, Inc., 117 West Fourth Street, Cincinnati, Ohio. Investment in business, $199,609.76, (Deft. Exh. 5).

1 j Roeper, Hanson & Newman Co., former owner of premises at 139 West Fourth Street, Cincinnati, Ohio. Value of premises at time of sale in 1968, $80,000.00, Gollusch, (18 tr. 1816). Value as per William H. MacConnell, expert real estate appraiser, $65,000.00, (22 tr. 2229; Pl. Exh. B-13).

1 k Pigall's French Restaurant, Inc., 127 West Fourth Street, Cincinnati, Ohio. Investment in business, $106,714.00. (Pl. Exh. M-3-A).

1 l Aldan Company, 119 West Fourth Street, Cincinnati, Ohio, a real estate holding company. Value, $100,000.00, see Levine, (19 tr. 1870). As per William H. MacConnell, expert real estate appraiser, $100,000.00, (22 tr. 2228; Pl. Exh. B-13).

1 m Nanbil, Inc., 133 West Fourth Street, Cincinnati, Ohio, real estate holding company. Value of real estate, $150,000.00; Gillman, (19 tr. 1908). As per William H. MacConnell, expert real estate appraiser, $120,000.00, (22 tr. 2228; Pl. Exh. B-13).

. . . some of whom were forced to move under the threat of condemnation proceedings and resettled on the south side of Fourth Street between Race and Elm Streets . . .

5 a Plaintiff Joseph Karp was the owner of the premises at 142 West Fourth Street, (18 tr. 1824), who sold said premises to the City of Cincinnati under the threat of condemnation proceedings pursuant to the acquisition of the real estate for the alleged Urban Renewal Plan for Block D. (Pl. Exh. B-13).

5 b Plaintiff Aldan Company was the owner of the premises at 112 West Fourth Street, (19 tr. 1856), who sold said premises to the City of Cincinnati under the threat of condemnation proceedings pursuant to the acquisition of the real estate for the alleged Urban Renewal Plan for Block D, (Pl. Exh. B-13).

5 c Plaintiff The Gilsey Shoe & Handbag Co., Inc. is the successor in interest to the Gilsey Shoe & Handbag Company, which was located at 116 West Fourth Street and owned by the parents of Roger Greenberg, the sole stockholder of said plaintiff. The said Roger Greenberg was the General Manager of his parents' business on the north side of Fourth Street, which business was forced to close through actual condemnation proceedings and eviction proceedings filed by the City of Cincinnati in clearing the aforesaid land for the redevelopment of Block D, (15 tr. 1462). The said business was encouraged to relocate on the south side of Fourth Street by officials of the City government. MacConnell, (22 tr. 2220).

5 d Gilbert Karp, d.b.a. Main Auction Galleries, formerly operated his business on the north side of Fourth Street at 142 West Fourth Street, Cincinnati, Ohio, and was forced to vacate his premises

at such location by reason of the threat of condemnation proceedings pursuant to the acquisition of the premises occupied by him for the redevelopment of Block D. See Phyllis Karp, (10 tr. 961).

5 e Said plaintiff re-established his business on the south side of Fourth Street at 137 West Fourth Street so as to retain the good will established by him over the years in such area. (See 10 tr. 961), Phyllis Karp.

5 f Plaintiff Koch Embroidery & Pleating Shop, Inc., formerly operated its business on the west side of Race Street between Fourth and Fifth Streets in Block D, but was forced to vacate its premises under the threat of condemnation proceedings pursuant to the acquisition of said premises for the redevelopment of Block D. Said plaintiff was encouraged to reestablish his business on the south side of Fourth Street between Fourth and Elm by a representative of the Department of Urban Development of the City of Cincinnati, one Magorian. See Koch, (18 tr. 1765).

. . . because of the encouragement of City officials to relocate there . . .

8 e See Findings of Fact 5a - 5f.

8 f A number of the plaintiffs were encouraged to stay in the Fourth Street area because under the Urban Renewal Plan for Block D the property would be put to a higher and better use. MacConnell, (21 tr. 2165) and (22 tr. 2273, 2297).

. . . and remodeled or renovated their premises at substantial expense . . .

8 a Plaintiffs, Gibson & Perin Building Co. and Gibson & Perin Co., expended $43,737.00 in remodeling

the building and premises in which plaintiff Gibson & Perin Company operates its business at 121 West Fourth Street. (Pl. Exh. N-1).

8 b Plaintiff Nanbil, Inc., expended $60,000.00 in remodeling and rejuvenating its building for retail operations on the first floor, etc. Gillman, (19 tr. 1896).

8 c Plaintiff Gilsey Shoe & Bag Co., Inc., expended $20,000.00 for leasehold improvements for the operation of its business at 135 West Fourth Street, Cincinnati, Ohio, etc. See Greenberg, (15 tr. 1468).

8 d Plaintiff Joseph Karp expended in excess of $23,000.00 in rejuvenating his property at 137 West Fourth Street, Cincinnati, Ohio, which he acquired after having been forced to sell his property on the north side of Fourth Street to the City for the development of Block D. Karp, (18 tr. 1826).

. . . because of their level of expectation as to the development of Block D. . . .

18 t The level of expectation of the plaintiffs as to the Urban Renewal Plan for Block D prior to the publicity in May, 1965, (Pl. Exh. A-12), showing the proposed Pogue garage on the north side of Fourth Street between Race and Elm Streets, was that the parking facility for Block D was going to be located on the east side of Elm Street between Fourth and Fifth Streets, an office tower on the north side of Fourth Street between Race and Elm Streets with retail stores along the north side of Fourth Street and retail in the balance of said Block D. See Lowenthal, (9 tr. 835); Gorodesky, (11 tr. 1023); P. Karp, (10 tr. 964); Greenberg, (15 tr. 1469); Perin, (16 tr. 1543); Joseph, (10 tr. 1635); Koch, (18 tr. 1766); Gollusch, (18 tr. 1811);

J. Karp, (18 tr. 1824); D. Levine, (19 tr. 1859 to 1861); Gillman, (19 tr. 1895).

(b) All plaintiffs have a personal stake in the outcome of this litigation:

See Findings of Fact 1 a through 1 m under paragraph 1 above, and Findings of Fact 5 a - 5 f; 8 a - 8 f.

. . . as they are citizens of the immediate area whose businesses and property are directly affected by the design, construction and operation of the Pogue garage in Block D:

6 a Plaintiff Gibson & Perin Co. sells the following classes of merchandise which are in direct competition with defendant Pogue's Department Store: lamps, floor covering, draperies, gifts, pictures and mirrors, executive office furniture, interior decorating, stationary, greeting cards, small leather goods; see Perin, (16 tr. 1537) and (1538), which fact is confirmed by the testimony of Mr. Condon, (24 tr. 2401) and (2407).

6 b Plaintiff The Gilsey Shoe & Handbag Company, Inc., sells the following merchandise which is in competition with merchandise sold by defendant Pogue's: women's shoes, handbags, see Greenberg, (15 tr. 1474), which fact is confirmed by the testimony of Condon, (24 tr. 2401) and (2407).

6 c Plaintiff Gilbert Karp, d.b.a. Main Auction Galleries, sells some merchandise which is in competition with merchandise sold by defendant Pogue's Department Store, division of Associated Dry Goods Corporation. See Karp, (10 tr. 983), which fact is confirmed by the testimony of Condon.

6 d Plaintiff Koch Embroidery & Pleating Shop, Inc., is in direct competition with defendant Pogue's Department Store, division of Associated Dry

Goods Corporation, in regard to the sale of the following merchandise: blouses; jackets and windbreakers; award jackets; football, jockey, basketball, track and little league shoes and apparel; sale of uniforms; see Koch, (18 tr. 1803) and (1804), which fact was confirmed by Condon, (24 tr. 2460), of defendant Pogue's Department Store division.

6 e Plaintiff Lowenthal, Inc., is in direct competition with defendant Pogue's Department Store, division of Associated Dry Goods Corporation, in the sale of the following merchandise and services: storage of furs; cleaning, repairing and renting of furs; sale of furs; sale of ladies clothes; sweaters and ribbed knit jackets; scarves; Lowenthal, (9 tr. 870), which fact is confirmed by testimony of Condon, (24 tr. 2408).

6 f Pigall's French Restaurant, Inc., competes with defendant Pogue's Department Store, division of Associated Dry Goods Corporation, with regard to lunches served by the latter in its Camargo Room, to the degree that patrons shopping in Pogue's who formerly would have lunched at Pigall's eat at the Camargo Room because of its convenience and to the degree that former customers of plaintiff's who would have lunched at Pigall's while shopping on Fourth Street west of Race Street no longer do so but shop in Pogue's and lunch in said Camargo Room because of its convenience. See Gorodesky, (11 tr. 1067).

7 ll The value of the real estate owned by plaintiffs has been diminished as retail property by reason of the design of said garage, over what the value of the real estate would have been if the Urban Renewal Plan had been complied with by the construction of a garage in Block D accessible to pedestrian traffic from Fourth Street and which had

retail shops along the north side of Fourth Street from Race Street west, visible to pedestrians on both sides of Fourth Street:

(1) Gibson & Perin Building Company, see Perin, (16 tr. 1553, 1554), the measure of loss, according to Mr. Perin was $75,000.00; according to Mr. Oelerich was $37,360.00, see Oelerich, (21 tr. 2128); according to Mr. MacConnell was $40,000.-00, see MacConnell, (22 tr. 2221, 2228).

(2) J & L Realty, et al., the measure of damages, according to Mr. Sylvan Joseph, was $90,000.00, see Joseph, (16 tr. 1633, 1634). The measure of damages according to Mr. Oelerich was $111,138.00, see Oelerich, (21 tr. 2139); and the measure of damages according to Mr. MacConnell was $105,-000.00, see MacConnell, (22 tr. 2222, 2229).

(3) The measure of damages according to Mr. Joseph Karp was $25,000.00, see Karp, (18 tr. 1826, 1831); according to Mr. Oelerich was $40,560.00, see Oelerich, (21 tr. 2129); and the measure of damages according to Mr. MacConnell was $25,-000.00, see MacConnell, (22 tr. 2222, 2229).

(4) Roeper, Hanson & Newman Co., the measure of damages according to Mr. Joseph Gollusch was $45,000.00, see Gollusch, (18 tr. 1813, 1817). The measure of damages according to Mr. Oelerich was $32,820.00, see Oelerich, (21 tr. 2129); and the measure of damages according to Mr. MacConnell was $15,000.00, see MacConnell, (22 tr. 2222, 2229).

(5) Hawley Todd, Trustee for Gibson & Perin Building Company, the premises occupied by Pig-all's French Restaurant, Inc., the measure of damages according to Mr. Perin was $50,000.00 to $75,-000.00, see Perin, (16 tr. 1570). The measure of

damages according to Mr. Oelerich was $40,790.00, see Oelerich, (21 tr. 2128); and the measure of damages according to Mr. MacConnell was $44,000.00, see MacConnell, (22 tr. 2222, 2228).

(6) Aldan Company, the measure of damages according to Mr. Daniel Levine was $65,000.00, see D. Levine, (19 tr. 1862, 1970); according to Mr. Al Levine, was $50,000.00, see A. Levine, (20 tr. 1946, 1948); according to Mr. Oelerich was $49,860.00, see Oelerich, (21 tr. 2128); according to Mr. MacConnell was $65,000.00, see MacConnell, (22 tr. 2222, 2228).

(7) Nanbil, Inc., owner of the premises at 133 West Fourth Street, was $100,000.00 according to Mr. Gillman, see Gillman, (19 tr. 1900, 1908); according to Mr. Oelerich was $46,310.00, see Oelerich, (21 tr. 2128); according to Mr. MacConnell, was $58,000.00, see MacConnell, (22 tr. 2222, 2228).

7 mm The development of the southern portion of Block D by said defendants, including the design, construction and operation of the said Pogue garage diverting pedestrian traffic away from Fourth Street west of Race and funnelling same into Pogue's, has suppressed competition between plaintiffs and defendant Pogue division of Associated Dry Goods Corporation and has caused the following plaintiffs to suffer damages by reason thereof:

(1) The diversion of pedestrian traffic from Gilsey Shoe & Handbag Co., Inc., because of the opening of the Pogue garage on June 1, 1967, has made it impossible for said company to operate successfully so that its investment in its business amounting to approximately $90,000.00 is about to be lost. See Greenberg, (15 tr. 1469); Wessel, (13 tr. 1295).

(2) Pigall's French Restaurant, Inc., has sustained a loss of profit in the operation of its restaurant business, since the opening of the Pogue garage on June 1, 1967, because of the diversion of pedestrian traffic from Fourth Street west of Race Street occasioned by the design of the Pogue garage whereby pedestrians were deprived of access to and from the garage from Fourth Street, and thus diverted from said restaurant, and said plaintiff was deprived of "doorman" parking for its customers, and a substantial portion of such traffic was funnelled into Pogue's by means of the bridge over Race Street, in the amount of $282,000.00 to $329,000.00 and the present value of the future losses to be sustained by said plaintiff Pigall's French Restaurant, Inc., by reason of the foregoing on a conservative basis is $282,000.00 to $330,000.00; Wessel, (13 tr. 1259).

(3) Plaintiff Gibson & Perin Co. has sustained a loss of profits in its retail merchandise business since the opening of the Pogue garage on June 1, 1967, by reason of the diversion of pedestrian traffic from Fourth Street west of Race Street because of the design of the garage funnelling a substantial portion of said traffic into Pogue's and precluding pedestrian access to same from Fourth Street in the amount of $39,700.00 and the present value of the future losses to be sustained by said plaintiff for the foregoing reason are $66,000.00 to $132,000.00; Wessel, (13 tr. 1282, 1283).

(4) Plaintiff Lowenthal, Inc., has sustained a loss of profits since the opening of the Pogue garage on June 1, 1967, in the amount of $16,000.00, and its present value of future losses to be sustained by said plaintiff by reason of the design of the garage funnelling pedestrian traffic into Pogue's

and away from Fourth Street west of Race Street because of the lack of access to such garage from Fourth Street is $80,000.00, Wessel, (13 tr. 1289).

(5) Plaintiff Gilbert Karp, d.b.a. Main Auction Galleries, has sustained a loss of profits in the operation of his business since the opening of the Pogue garage on June 1, 1967, because the design of such garage has diverted pedestrian traffic from Fourth Street west of Race Street as said garage was designed exclusively to benefit Pogue division of Associated Dry Goods Corporation. The amount of such loss of profit is difficult to ascertain because of the nature of the business of Main Auction Galleries. However, said plaintiff has incurred additional operating expenses in advertising and other methods of soliciting business, and the gross profits on sales of said business is decreasing because those bidding at the auction are mainly dealers since very few, if any, potential customers come in off the street as had been the practice prior to the construction of the Pogue garage, to bid at said auctions, P. Karp, (10 tr. 972-977).

(6) Plaintiff Koch Embroidery & Pleating Shop, Inc., increased its retail business substantially shortly after the opening of the Pogue garage on June 1, 1967, by opening a sporting goods department. Although it increased its purchases from $328,097.61 for the fiscal year ending December 31, 1968, to $398,524.19 for the fiscal year ending 1969, and its gross sales increased $102,005.06 between fiscal years ending December 31, 1968, and December 31, 1969, its net profits between the two years declined slightly. The primary reason for failing to have increased profits commensurate with increased sales and purchases was the added cost of doing business in seeking customers such as costs

for additional advertising and sales personnel, which were incurred in order to maintain sales because of the design of the Pogue garage which diverts pedestrian traffic from Fourth Street west of Race Street into Pogue's Department Store. See Koch, (18 tr. 1805).

(c) Plaintiffs have been actively engaged in trying to rectify the situation by seeking relief from officials of the City of Cincinnati, the Department of Housing and Urban Development of the Federal Government and from officials of defendant Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation.

10 a Plaintiffs sought relief from defendants Cincinnati Redevelopment Corporation and Associated Dry Goods Corporation at the meeting on June 29, 1966, in the City Manager's office; and from Associated Dry Goods Corporation at the meeting with Mr. Lewis P. Seiler, its President, and Arthur F. O'Day, Vice President Real Estate, in New York City on November 11, 1969. See Brooks, (21 tr. 2081) Condon, (14 tr. 1416); O'Day, (20 tr. 2043); and (Pl. Exh. F-28), letter of Spiegel to Seiler of November 22, 1966.

10 b Plaintiffs sought relief from officials of the City of Cincinnati at the meeting with Peter Kory on June 6, 1966, in Pigall's French Restaurant; Kory, (7 tr. 673); and at the meetings in the office of the City Manager on June 28 and 29, 1966, Kory, (27 tr. 2719); Lowenthal, (9 tr. 845); Joseph, (17 tr. 1672); Gillman, (19 tr. 1902); P. Karp, (10 tr. 989); Gorodesky, (11 tr. 1035); Greenberg, (15 tr. 1479, 1482); Perin, (16 tr. 1560); and from the City Council of the City of Cincinnati by written communication on June 29, 1966, (Pl. Exh. H-3), and at various meetings before the City Plan-

ning Commission in September, 1966, the Urban Development Committee of City Council in October, November, December of 1966 and January of 1967; see (Pl. Exhs. A-16, A-17, A-18, A-19, A-20, A-20-A); Gradison, (6 tr. 516).

10 c Plaintiffs sought relief from the Department of Housing & Urban Development in Washington, see (Pl. Exhs. R-1 through D-12).

10 d The defendant City of Cincinnati failed to enforce the terms and restrictions imposed by the Urban Renewal Plan, CBD Core Project, upon the real estate conveyed by the City of Cincinnati to defendant Cincinnati Redevelopment Corporation, upon the request of the plaintiffs; so that plaintiffs were required to bring this action on their own behalf directly against said defendants. See (Pl. Exhs. 6-A, 6-B, 6-C and 7); and McClain, (2 tr. 109-116, 177).

2. *The purported Urban Renewal Plan for Block D of the Central Business District core project provides:*

2 a *Section B. Description of Project*

1. Boundary description of the Urban Renewal Plan CBD Core project, Cincinnati, Ohio, recites:

"Beginning at the point of intersection of the north line of Seventh Street and the west line of Elm Street; thence east along the north line of Seventh Street to the point of intersection of the north line of Seventh Street and the east line of Vine Street; thence south along the east line of Vine Street to the point of intersection of the east line of Vine Street and the north line of Sixth Street; thence east along the north line of Sixth Street to the point of intersection of the north line of Sixth Street and the east line of Sycamore Street; thence south along the east

line of Sycamore Street to the point of intersection of the east line of Sycamore Street and the south line of Fourth Street; thence west along the south line of Fourth Street to the point of intersection of the south line of Fourth Street and the west line of Elm Street; thence north along the west line of Elm Street to the point of intersection of the west line of Elm Street and the north line of Seventh Street, which is also the point of beginning." See (Pl. Exh. A-3).

3 b *Section C. "Objectives of the Project."* of the CBD Core project, Urban Renewal Plan, Pl. Exh. A-3, provides: "The general objectives for the development of the Core project shall be as follows:

• • •

"d. To improve the usefulness and desirablity of the Core and Core functions by:

• • •

"(2) Facilitating the movement of vehicular and service traffic within the Core; providing where possible vehicular on lower levels (below grade) with pedestrian circulation at or above grade.

• • •

"(4) Providing adequate parking as close to destination goal as possible, with wherever possible the objective being the selective elimination in time of curb parking spaces with the provisions of new public off-street parking facilities.

• • •

"(5) Providing efficient pedestrian linkages between the Core and complementary uses."

3 c *Section D. "Land Use Plan."* of the CBD Core Project Urban Renewal Plan, (Pl. Exh. A-3), provides with regard to Areas D, G and I:

"a. The objective here is to redevelop for predominant uses as follows:

"1. Areas D and G

"Predominant use as retail, parking and motor hotel with additional but not predominant use for office. (Note: It is preferred to treat these two areas as single entity.)

• • •

"b. Program of Space and Use

"1. For Areas D and G

"a. Office* – from 160,000 to 240,000 square feet.

"b. Motor hotels – 300 rooms.

"c. Retail – from 180,000 to 220,000 square feet.

"d. Low-rate parking – from 1200 to 1700 cars dependent upon street capacity at site.

"*Tenant parking is provided at one space per 1500 sq. ft. of office space.

"c. Basic Organization

"1. Retail continuity is to be retained in the design of Areas D and G with orientation primarily toward Race Street and secondarily toward Fifth Street.

• • •

"3. The development of office space in Area D shall be oriented to Fourth Street so as to maintain a proper relationship to the general office Core.

• • •

"d. Street widths

"Elm – 50′ curb to curb (5-10′ lanes) maintain existing west curb line.

• • •

"Fourth – 50′ from curb to curb throughout.

• • •

"e. Pedestrian Circulation

"The design shall recognize the pedestrian movements at grade and on the second level."

"f. Truck Service

"1. An underground truck service area shall be provided for the facilities of Area D and Pogues."

. . . under which the property was acquired by the City of Cincinnati, cleared and conveyed to defendant Cincinnati Redevelopment Corporation for the construction of the Pogue garage for defendant Associated Dry Goods Corporation:

4c The City of Cincinnati acquired the real estate on which the Pogue garage was constructed, including the Fifth Street driveway to it, at a cost of $2,448,200.00 and the cost of demolishing the structures thereon to the City of Cincinnati was $107,758.00 so that the total acquisition and demolition costs to the taxpayers for the land and driveway occupied by the Pogue garage was $2,555,958.00, (Pl. Exh. A-30). Said premises were sold to defendant Cincinnati Redevelopment Corporation for the construction of the Pogue garage for $587,777.04, (Pl. Exh. A-6-(a) and A-6-(b)).

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
OCT 16 1973
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-522

GIBSON & PERIN CO., et al.,
Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT CITY OF CINCINNATI IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-522

GIBSON & PERIN CO., et al.,

Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENT CITY OF CINCINNATI IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Appendix page 1) is reported at 480 F. (2d) 936. The Memorandum of Decision of the District Court (Appendix page 18) is not yet reported.

JURISDICTION

The jurisdictional requisites for the Petition for Writ of Certiorari are adequately set forth in the petition.

STATEMENT

This case concerns the Cincinnati Business District Core Project Urban Renewal Plan, hereafter referred to as "Plan". Cincinnati City Council in 1962, after two public hearings, adopted the Plan by ordinance. City Council amended the Plan in 1964 and 1965. Since adoption and implementation of the Plan many old dilapidated, unsafe business buildings in blighted sections of Cincinnati have been torn down and replaced with fine, new, privately-owned buildings, with the help of private industry. The opinion of the Sixth Circuit Court of Appeals notes, urban renewal in Cincinnati has been an outstanding success and real boon to the city. The Court of Appeals further notes, that of all the many new buildings that have been constructed under the Plan, only the one in issue here has been questioned and that is Pogue's seven-story shoppers' parking garage, which opened June 1, 1967. (Appendix page 1). The garage serves shoppers going to Pogue's and other department stores; and, in addition, provides parking for customers of other business places in the downtown core area. Open twenty-four hours a day, seven days a week, the garage provides parking for at least 1,200 cars, which is almost four times more parking than was previously available in the area. Retail space has been built into the garage at street level, part of which is rented to Closson's.

The garage was constructed under the terms of a contract between the City of Cincinnati and the developer, Cincinnati Redevelopment Corp., a private Ohio corporation, hereafter referred to as C.R.C. In 1965, when the City and C.R.C. entered into the development contract, C.R.C. agreed, inter alia, to construct a shopper-oriented

parking garage on urban renewal Block D[1] at the earliest possible time and in conformity with the Urban Renewal Plan. As built, the garage is located on the southerly portion of Block D, between Race and Elm Streets and along the north side of Fourth Street. Scissors ramps for vehicular traffic entering the garage were installed on the Fourth Street side of the garage to separate pedestrian traffic on the sidewalk area from vehicular traffic entering and exiting the structure. Elevators for pedestrian access are installed in an elevator tower at the east end of the building, on the west side of Race Street.[2]

When the garage was completed in 1967 it was conveyed by C.R.C. to Adcor Realty Company, a wholly-owned subsidiary of Associated Dry Goods Corporation, which operates Pogue's Department Store through one of its divisions.

The plaintiffs, all located outside the Urban Renewal Area, are retail merchants and the owner of a French restaurant, all with places of business owned or leased on the south side of Fourth Street, and located opposite the parking garage. They do not like the design and location of the parking garage. Plaintiffs on July 2, 1966, about one year after the City and C.R.C. entered into a development contract for Block D, filed their original complaint. Thereafter the complaint was twice amended and the case went to trial on the Third Amended Complaint[3] in which plain-

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[1] Block D, is an entire city block in the core of Cincinnati's central business district, and is bounded on the south by Fourth Street, on the west by Elm Street, on the north by Fifth Street, and on the east by Race Street.

[2] The garage meets the objectives of the Urban Renewal Plan. The objectives of the Plan are set forth, in part, at pages 10, 11 and 12 of the Petition For a Writ of Certiorari.

[3] This case was tried in the District Court without a jury. The trial began June 2, 1970, and concluded June 25, 1970; the Memorandum

tiffs claimed, inter alia, a change in the Plan was made and they did not receive the benefits from the Urban Renewal project which they expected. Plaintiffs accused defendants of violating their civil rights, conspiracy, fraud, violation of federal and state anti-trust laws, denial of due process of law and equal protection of the laws.

Defendants named in the Third Amended Complaint were the City of Cincinnati; William C. Wichman, who was City Manager, and is now deceased; Cincinnati Redevelopment Corp. (C.R.C.); Associated Dry Goods Corporation; H. & S. Pogue Co. Inc.; Adcor Realty Company; Morgan Guaranty Trust Co., which acquired the title to the property from Adcor Realty Company under a lease-back arrangement; the Regional Director of HUD; and the Secretary of the United States Department of Housing and Urban Development, the latter two of whom were voluntarily dismissed from the case.

This matter was tried in the District Court without a jury. The District Court held plaintiffs had standing, that construction of the garage along Fourth Street, rather than along Elm Street, violated the Urban Renewal Plan, and entered a mandatory injunction requiring defendants to make alterations to the garage (Appendix page 4). The Court of Appeals for the Sixth Circuit reversed the mandatory injunction and remanded the case to the District Court with instructions to dismiss the complaint. The Court of Appeals held that parties outside the Urban Renewal Area do not have standing to question the design

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Opinion of the District Court was filed July 26, 1971. The United States Court of Appeals for the Sixth Circuit on June 26, 1973, reversed the District Court's decision, remanded the case to the District Court with instructions to dismiss the complaint against the City of Cincinnati and other named defendants.

and location of buildings which have been approved by the Urban Renewal Authority as being in conformity with the Plan. (Appendix pages 5 and 6).

ARGUMENT

The issue presented in this case is whether plaintiffs, who are retail merchants, outside an urban renewal area, may invoke the jurisdiction of the Federal Courts to air their general complaints regarding the legislative determination of use, design, and location of structures within a designated urban renewal area. This Court has decided the issue in *Berman* v. *Parker,* 348 U.S. 26 (1954), therefore, a review of this case on certiorari is unwarranted.

The City of Cincinnati has strongly contested jurisdiction, contrary to the assertion of plaintiffs, that "Jurisdiction was not contested by the defendants". (Petition page 16).

Article III of the United States Constitution limits the judicial power of federal courts to *cases* and *controversies* wherein the federal courts determine they have jurisdiction, the parties have standing, and there exists a justiciable controversy. None of the elements of a *case* or *controversy* are present in this case.

I

THE COURT OF APPEALS DECISION IS CORRECT.

To invoke the judicial power of the federal courts plaintiff must have standing and the Court must have jurisdiction. In this case plaintiffs fail to meet the standing tests, they suggest:

1) As federal taxpayers;
2) Under the Administrative Procedure Act;
3) As persons having a personal stake in the outcome of the case; and
4) As private attorneys general.

Both the District Court and Court of Appeals rejected as "untenable" plaintiffs' contention of standing as federal taxpayers and under the Administrative Procedure Act (Appendix page 5). We agree, and since plaintiffs have failed to argue standing as federal taxpayers or under the Administrative Procedure Act, assume they, too, consider such contentions "untenable".

The thrust of plaintiffs standing argument is directed to this Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970). This Court decided both cases the same day and established a three-prong standing test. The elements of the test are:

1. Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise (397 U.S. at 152),
2. Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question (397 U.S. at 153),
3. Whether judicial review has been precluded (397 U.S. 156).

However, the standing test announced in *Data Processing* is applied only after the question of jurisdiction in the federal courts is considered in the framework of Article III of the United States Constitution,

> "As we recently stated in *Flast* v. *Cohen*, 392 U.S. 83, 101, '[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context in a forum historically viewed as capable of judicial resolution." (397 U.S. at 151).

In the present case, plaintiffs attack the determination of Cincinnati City Council, the legislative body that conducted the public hearings, enacted the ordinances, and implemented the City Urban Renewal Plan. Historically the proper forum for resolution of plaintiffs' disputes regarding location and design of urban renewal improvements is City Hall. The federal courts are not the forum, nor is it the function of the federal courts to sit in review of legislative determinations. *Berman* v. *Parker*, 348 U.S. 26 (1954). Assuming, arguendo, there was an Article III *case* or *controversy* in this case, plaintiffs still fail to meet the standing tests of *Data Processing* v. *Camp*, 397 U.S. 150 (1970).

1. *Economic Injury Test.* Plaintiffs contend there has been injury to their economic interests. This is fallacious. Nowhere in the proof nor District Court findings is there anything which resembles rules, regulations, ordinances, statutes or conduct, directed toward suppression of plaintiffs' equal economic opportunity in the market place.

2. *Zone of Interests Test.* The "zone of interests" test set forth in *Data Processing* goes to the merits of a case. The question is whether the interest sought to be protected is regulated or protected by a constitutional guarantee. Here, plaintiffs are all located outside the urban renewal area and have no personal stake, nor are they within the

zone of interest protected or regulated by statute or constitutional guarantee.

The Slum Clearance-Urban Renewal Statutes, 42 U.S.C. § 1441, et seq., were not enacted by Congress to protect nor guarantee plaintiffs' economic zone of interest. Nothing was taken from plaintiffs in violation of the Fifth and Fourteenth Amendments to the United States Constitution or the Constitution of the State of Ohio.

3. *Judicial Review is Precluded.* The Slum Clearance-Urban Renewal Satutes, 42 U.S.C. § 1441, et seq., do not give rise to a cause of action. The Court of Appeals said in its opinion:

> "No cases have been cited to us by the [District] Court or by the parties, nor have we found any cases, where persons located outside the Urban Renewal area have been permitted to question the design or location of buildings approved by the agency (the City, in the present case) as being in conformity with the Plan, said agency having been authorized by Congress to act. There is no general statutory right of appeal to the United States District Court from decisions of federal, local, or public agencies, and private persons engaged in urban renewal projects * * *." (Appendix page 5)

Plaintiffs suggest in their petition the Court of Appeals has incorrectly applied the teachings of *Data Processing* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), and direct the Court's attention to cases (Petition page 19) they say grant them standing even though they are admittedly outside the Urban Renewal Area. Rather than comment on each of the cases cited by plaintiff it is enough to say that in each the court found the litigant to have standing by virtue of a congressional

act or a constitutionally protected right which had been clearly violated.[4]

II

THERE IS NO CONFLICT OF DECISION.

Plaintiffs assert the decision of the Court of Appeals for the Sixth Circuit is in conflict with decisions of other United States Circuit Courts of Appeal. We disagree.

In *Springfield Television, Incorporated* v. *City of Springfield, Mo.*, 462 F. 2d 21 (8th Cir., 1972), the court found there had been a violation of a protected right guaranteed by the Springfield, Missouri City Charter. The Charter provided no city ordinance granting a public utility franchise would become effective until submitted and approved by a majority of the electors voting thereof. The ordinance granting the franchise had not been submitted to the voters. In *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948 (9th Cir., 1972), the plaintiffs were suffering a specific invasion of their protected rights as third party beneficiaries of an agreement between the City of Los Angeles and the Federal Aviation Administration. In *Virgin Islands Hotel Association* v. *Virgin Islands W & P Authority*, 465 F. 2d 1272 (3rd Cir., 1972), the defendant increased electric power rate charges without providing a proper and meaningful hearing as required by statute.

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[4] *Investment Company* v. *Camp*, 401 U.S. 617 (1971), specific violation of the Glass-Steagall Act; *Baker* v. *Carr*, 369 U.S. 186 (1962), one-man one-vote right to representation; *Griggs* v. *Alleghany County*, 369 U.S. 84 (1962), citing *United States* v. *Causcy*, 328 U.S. 356 (1946), eminent domain cases.

III

THE COURT OF APPEALS CORRECTLY DECIDED THE STATE QUESTIONS OF STREET VACATION NOTICE AND GOVERNMENTAL IMMUNITY.

Contrary to the plaintiffs' conclusion at page 22 of their Petition for a Writ of Certiorari, the Court of Appeals relied on *State ex rel. Merritt* v. *Linzell,* 163 Ohio St. 97, 126 N.E. 2d 53 (1955), for the proposition that plaintiffs have no property right in the continuance or maintenance of the flow of traffic past their property and that diversion of traffic as a result of public improvement is not an impairment of a property right for which damages may be awarded (Appendix, page 13); and the Court of Appeals did not rely on said case in approving the City's street vacation without notice to plaintiffs.

Instead the Court of Appeals relied upon Section 723.06 of the Ohio Revised Code (erroneously designated as Section 723.09 at page 9 of the plaintiffs' Petition) which clearly states that notice of the intention of the legislative authority of a municipal corporation to vacate any street need not be published where there is filed written consent to such vacation with the legislative authority by the owners of the property *"abutting the part"* of the street proposed to be vacated. The Court of Appeals correctly accepted the City's contention that the controlling language here is *"abutting the part"* and that where the City was the fee owner of all the property abutting the part of the sidewalk vacated on the north side of Fourth Street, and where City Council on its own initiative as provided by law took action by Ordinance No. 147-1966 (Plaintiffs' Exhibit B-1) to vacate said portion of the sidewalk abutting its property, the conclusion must be that the City as abutting

owner consented to the vacation by passage of the ordinance thereby eliminating notice requirements in accordance with Section 723.06 of the Ohio Revised Code.

The plaintiffs on the south side of Fourth Street do not abut upon the part of the sidewalk that was vacated on the north side of Fourth Street. The case of *Bulen* v. *Moody*, 77 Ohio App. 61, 63 N.E.2d 916 (Franklin County, 1945), relied upon by the City in its briefs and argument before the Court of Appeals, clearly disposes of plaintiffs' contention that they were abutting owners entitled to notice of vacation. The Franklin County Court of Appeals stated in its opinion at page 64:

> ". . . it is our conclusion that the plaintiff is not an abutting property owner on the vacated part of the . . . alley . . . . There is no physical connection between the plaintiff's property and the portion of the alley vacated; thus the plaintiff's property does not abut upon the vacated portion of the . . . alley. 'Abutting' is a word of common usage. The lexicographers define it to mean 'to end'; 'to border on'; 'to touch'. 'Abutting' means any property that abuts or adjoins.
>
> No notice to the plaintiff of the vacation of such part of the alley was necessary."

This case is the single Ohio case most similar to the instant matter and clearly stands for the proposition that abutting means physically touching.

The plaintiffs confuse the rights they may have in the vehicular traveled portion of Fourth Street with physically "abutting," for *purposes of notice* upon the *part* of the street vacated. The vacation did not interfere with any access rights that the plaintiffs have to the center of Fourth Street or over its entire width; in fact, the Court of Appeals recognized in its opinion that Fourth Street was not narrowed (Appendix, page 13), and the District Court be-

low in its Memorandum Decision (Appendix, page 84) concluded:

> "We likewise conclude that failure to give notice to the plaintiffs in connection with street vacation proceedings (Fourth Street, Race Street and Elm Street), though pertinent as one of the circumstances which has to be assessed in determining the fourth cause of action, does not give rise to a cause of action for legal and equitable relief of the type the plaintiffs seek — where, as in this case, the *travelled* portion of the street on which the plaintiffs' businesses and properties are located is not narrowed."
>
> As heretofore noted (*Page 21*), the street was narrowed from 50 feet to 40 feet by the vacation. However, the vacated portion was the part of the street on which the sidewalk opposite plaintiffs was located. The vacation, therefore, in no wise affected the easement of the property owners among the plaintiffs to have ingress and egress to their properties. They have no other easements or property rights in the vacated portion of the street. As this indicates, we reject the contention of the plaintiffs that they have a cause of action for invasion of easements for light, air and view."

Plaintiffs' confusion of their rights to access in the vehicular portion of Fourth Street with physically "abutting" for *purposes of notice* upon the *part* of the Fourth Street sidewalk vacated is emphasized by their citing the cases of *State ex rel. McKay* v. *Kauer,* 156 Ohio St. 347, 102 N.E. 2d 703 (1951), and *Fry* v. *O'Leary,* 141 Wash. 465, 252 Pac. 111, and 49 A.L.R. 1249 (1927). These again were two cases involving limitation of access to or narrowing of the traveled portion of the public street and the consequential pro tanto taking of property rights from abutting owners. In fact, the *Kauer* case cited the *Fry* case for the limited purpose of indicating that the majority of American jurisdictions have adopted the rule of "pro tanto taking" as a

basis for compensation. The *Fry* decision was not based upon the right of owners on the other side of the street to be notified of the vacation, for the Washington Supreme Court stated at page 252:

> "There can be no question but what, under our decisions, the power of vacation of streets and alleys or portions thereof belongs to the municipal authorities, and the exercise of that power is a political function which, in the absence of collusion, fraud, or other interference with a vested right, will not be reviewed by the court; and the one who suffers damages similar to those sustained by the public generally will not be heard in complaint."

Also the *Fry* case originated in the State of Washington where an owner has a right to view, light and air in the street, but Ohio does not allow a right to air, light and view in the street to an abutting owner as held by the Ohio Supreme Court in the case of *State ex rel. Schiederer* v. *Preston,* 170 Ohio St. 542, 11 O.O. 2d 369 (1960).

Vacation of the sidewalk on the north side of Fourth Street in the instant case did not interfere with plaintiffs' access on the south side of Fourth Street. There is no allegation of collusion or fraud in the instant action regarding City Council, and it was stipulated by the parties that the City indeed followed the *same procedure* over the years in vacating a portion of one side of a street, whether upon petition or upon City initiative (Record Volume 30, page 3066). The City simply followed its usual procedure in vacating the sidewalk on the north side of Fourth Street with its legislative arm approving by ordinance the propriety of the vacation.

The controlling language in Section 723.06 of the Ohio Revised Code is *"abutting the part."* This is different than the language used in the levy of special assessments

for street improvements, for instance, where the assessment is levied against all property abutting the street. Such assessment language as used in *Cincinnati* v. *Batsch,* 52 Ohio St. 324, 40 N.E. 21 (1895), cited by plaintiffs, pertains simply to assessments and is quite logical. It does not refer to the notice or waiver thereof mentioned in Ohio Revised Code Section 723.06, and this case at best indicates that plaintiffs on the south side of Fourth Street would be liable for assessment for the widening of Fourth Street on the north side should there be an assessment for such improvement. The theory again being based on recognition of the access rights of the abutting owner to the traveled portion of the street which were not interfered with in the instant case.

IV

URBAN RENEWAL IS A GOVERNMENTAL FUNCTION.

The Court of Appeals was correct in finding that urban renewal activities are classed as governmental and not proprietary in Ohio, and that the City of Cincinnati cannot be held liable for performance of such acts. Just because Cincinnati voluntarily elected to contract with the Federal Government to undertake the Central Business District, Core Urban Renewal Project cannot serve to make that project a "private and proprietary function." If that were so, every federal aid program voluntarily undertaken by state, county and municipal governments — interstate highway systems, county welfare programs, local anti-poverty programs to mention some better known examples — would be transformed from a governmental to a proprietary function.

Ohio recognizes slum and blight clearance and prevention as a public purpose in the landmark case of *State, ex rel. Bruestle* v. *Rich,* 159 Ohio St. 13, 110 N.E. 2d 778 (1952), where Syl. 1 holds that when an urban redevelopment project has as its primary purpose the elimination of slum conditions and prevention against their recurrence, such project may involve a public use or purpose within the meaning of Section 19, Article I of the Ohio Constitution for which public funds can be expended and the power of eminent domain exercised.

In view of the purposes of Central Business District, Core Urban Renewal Plan, deemed by Cincinnati City Council to be necessary to protect the public health, safety, property and welfare of the residents thereof, including the reduction of crime and losses from fire and accident, and in view of the *Bruestle* case holding that an urban renewal project involves a public purpose, the Court of Appeals properly found and determined that the City of Cincinnati was exercising the police power of the state in implementing the Central Business District, Core Urban Renewal Project including Block D and hence was engaged in the performance of governmental functions as held by the United States District Court in *Sayre* v. *United States,* 282 F. Supp. 175 (D.C. Ohio 1967), and not liable for alleged injuries arising out of the City's performance of said urban renewal activities.

Certainly a municipal corporation engaged in urban development activities to remove blight and thereby safeguard the public health, safety, property and welfare, reduce crime and losses from fire and accident meets the governmental function test of *Wooster* v. *Arbenz,* 116 Ohio St. 281, 156 N.E. 210 (1927), just as nicely as does a municipal corporation engaged in the health-preserving service of collecting garbage for its inhabitants, *Broughton* v. *Cleveland,*

167 Ohio St. 29, 146 N.E. 2d 301 (1957), or in the improvement of streets as in the *Arbenz* case itself.

Contrary to plaintiffs' contention, Ohio's doctrine of sovereign immunity does not violate the Fifth and Fourteenth Amendments to the Federal Constitution, nor does the Civil Rights Act abrogate said doctrine as held by the Court of Appeals for the Sixth Circuit in *Corbean* v. *Xenia City Board of Education*, 366 F. 2d 480 (6th Cir. 1966).

The Ohio cases cited by plaintiffs at page 23 of their Petition For A Writ of Certiorari in support of the proposition that Article I, Section 19 of the Ohio Constitution is violated when property is taken completely or pro tanto by a city without compensation to its owner, are not applicable to the instant case where it is clear from the undisputed facts that there has been no taking of plaintiffs' properties by defendants within the meaning of the Ohio and Federal Constitutions requiring payment of just compensation. The losses allegedly occasioned to plaintiffs were not the result of any intrusion or encroachment by defendants upon plaintiffs' properties and businesses. Rather plaintiffs claim their losses were caused by the loss of customers when the former retail-commercial area on the north side of Fourth Street between Race and Elm Streets was transformed into a shopper-oriented 1200 car garage by the CBD Core Urban Renewal Plan. Loss of customers is not a taking of property in a constitutional sense, and the action of defendants has not resulted in the diminution of plaintiffs' rights in their properties and businesses. *Woodland Market Realty Co.* v. *Cleveland*, 426 F. 2d 955 (6th Cir. 1970). *Sears* v. *City of Cincinnati*, 31 Ohio State 2d 157, 285 N.E. (2d) 732 (1973), is not controlling in the instant case since in *Sears* the Ohio Supreme Court found that operation of a municipal hospital is not a service essential to municipal government, nor an inherently gov-

ernmental function; however, urban renewal has been held by the same Ohio Supreme Court to be governmental and a matter of general public welfare for which the power of eminent domain can be exercised by the City. Eminent domain is necessary for urban renewal and can be exercised by the City alone for such lawful purpose of government.

V

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The suggestion that this Court should exercise its power of supervision because the Court of Appeals for The Sixth Circuit departed from the accepted and usual course of judicial proceedings, is so totally without merit no additional comment is necessary.

CONCLUSION

This Court for all of the foregoing reasons should deny the Petition For a Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-522

GIBSON & PERIN CO., et al.,
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vs.

CITY OF CINCINNATI,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CINCINNATI REDEVELOPMENT CORP. AND ASSOCIATED DRY GOODS CORPORATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-522

GIBSON & PERIN, et al.,
Petitioners,

vs.

CITY OF CINCINNATI,
CINCINNATI REDEVELOPMENT CORP.,
ASSOCIATED DRY GOODS CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CINCINNATI REDEVELOPMENT CORP. AND ASSOCIATED DRY GOODS CORPORATION IN OPPOSITION

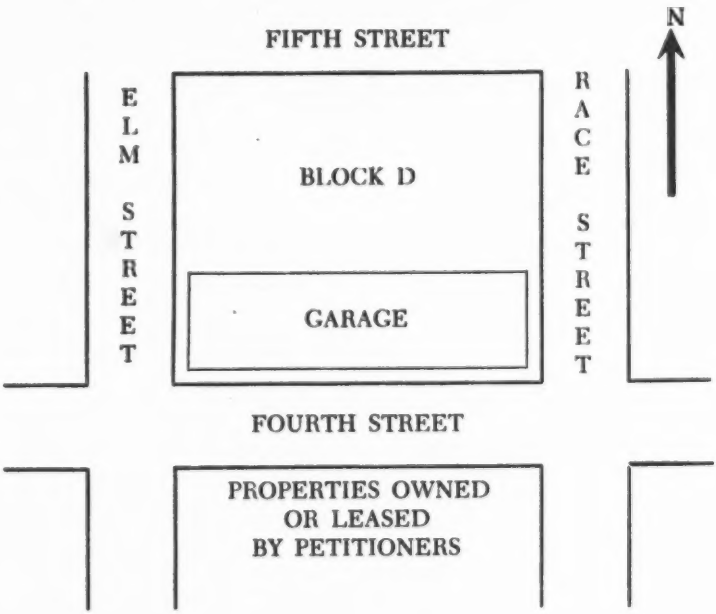
STATEMENT OF THE CASE

The facts of this controversy cover a time span from 1962 to 1966 and may appear to be complex. However, the key and dispositive facts are relatively simple and are succinctly stated in the opinion of the Court of Appeals. The basic facts disclose an essential and productive urban renewal program for downtown Cincinnati which serves the highest priority social needs. The program was carried out with detailed and scrupulous adherence to the procedural requirements of due process and in its fruition admittedly has been of great benefit to the Cincinnati area. Petitioners do not like the design and location of a parking garage located in the urban renewal area and seek to translate their dislike into a constitutionally forbidden deprivation.

Petitioners' Statement of the Case contains factual inaccuracies and, accordingly, Respondents deem it necessary to present the following Statement of the Case which is material to consideration of the questions presented.

The Cincinnati Business District Core Project Urban Renewal Plan (hereinafter referred to as the Urban Renewal Plan) as adopted by ordinance passed by the City Council of Cincinnati on June 27, 1962, established recommended predominant land uses for the different tracts within the core project area. Section D of the Urban Renewal Plan, footnoted in the Petition for Certiorari at 11-12, established the predominant land uses which can be developed within each block of the core project area, with the stipulation that in most cases there would be only a single predominant land use. Sec. D(3)(c).[1]

The core project area included the block bounded by Fifth Street on the north, Fourth Street on the south, Race Street on the east and Elm Street on the west.



[1]Petitioners neglected to include section D(3) in their Petition, which section is as follows:

This block, designated for redevelopment purposes as Block D, Area D or Tract D, was one of the most deteriorated blocks within the entire urban renewal area. Petitioners are businessmen who either rent or own businesses on the south side of Fourth Street directly across the street from the southern portion of block D. Petitioners' properties were not included within the urban renewal area.

The "objective" for Tracts D and G, considered as a unit, was the development of the predominant land uses of "retail, parking and motor hotel." Sec. D(3)(c)(4)(a)(1). "Office" was listed as an additional use but it was expressly excluded as a predominant use. Sec. D(3)(c)(4)(a)(1).

The Urban Renewal Plan does not require the construction of land uses, whether predominant or additional, in a specific location. Rather, the Urban Renewal Plan was written in terms of "orientation toward," "continuity with," and "open feelings," terms which allow the construction of the permitted uses anywhere within the given tract.

City Council appointed the City Manager to execute and administer the urban renewal programs for Cincinnati. However, City Council retained all powers to select redevelopers and to approve their contracts with the City. The procedure established by City Council to achieve the redevelopment of the core project area involved Council's calling for bids on various projects. City Council would then review the bid proposals and select a redeveloper. Once a redeveloper was chosen, City Council by ordinance

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Section D. Land Use Plan – More specifically detailed by Volume II Urban Design Plan hereby attached . . . .

3. Land Use Provisions and Building Requirements. The Urban Renewal Plan establishes the following predominant land uses. Recognition is given to the fact that there will be subordinate uses mixed with them.

would approve the terms and conditions of the redeveloper's contract and deed. City Council was the only public body which determined whether proposed redevelopment plans conformed to the Urban Renewal Plan. Following passage of the ordinance by City Council, approving the redeveloper's contract and deed, the City Manager on behalf of the City would then enter into the contract with the redeveloper and convey property to him.

Pursuant to this procedure, City Council in February, 1965, passed a resolution establishing the bidding procedure for Tracts A, D, G and I in the urban renewal area. After a public bidding Council selected Respondent Cincinnati Redevelopment Corporation as the redeveloper for these four core project tracts. The bid of the redeveloper called for the construction of a parking garage in the southern portion of Block D along the Fourth Street frontage. The redeveloper's offer for the entire Block D was 1.4 Million Dollars. On July 8, 1965, City Council passed an ordinance approving the bid as being "in accordance with said [urban renewal] plan" and authorizing the Mayor and City Manager on behalf of the City to execute the contract and the deed. City Council then established the terms and conditions of the redeveloper's contract which called for the construction of the garage as described in the bid. The contract, which covered the redevelpment of Blocks A, D, G and I, was executed by Cincinnati Redevelopment Corporation and the City on August 19, 1965.

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a. Land Uses
   (1) Downtown retailing.
   (2) General downtown office.
   (3) Housing.
   (4) Motel-Hotel.
   (5) A combination of institutional and governmental uses.
   (6) Secondary retailing distribution and light manufacturing uses.
   (7) Off-street parking.

Pursuant to its redevelopment contract Respondent Cincinnati Redevelopment Corporation submitted schematic plans to the City Manager in December, 1965. Those plans positioned the garage in the south portion of Block D, abutting Elm, Fourth and Race Streets rights-of-way. The plans disclosed an elevator tower at the northeast corner of the garage, automobile entrance and exit (scissor) ramps on Fourth Street, and an automobile entrance ramp on Elm Street. On January 4, 1966, the City Manager notified the redeveloper that he had approved the schematic plans as conforming to the Urban Renewal Plan. Prior to notifying the redeveloper, the City Manager wrote City Council advising them that action by City Council would be necessary in order to accomplish the construction of the ramps on Fourth and Elm Streets and the location of the walkways behind the ramps.

Subsequent to approval of the schematic plans, the Urban Design Review Board, which had been created in 1964 by the City in order to assist the City Manager in determining whether developers' plans conformed to the Urban Renewal Plan, asked the redeveloper to relocate the elevator tower outside of the garage in the middle of

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b. • • •

c. Predominant Land Uses for Redevelopment Areas. Within the above recommended generalized predominant land uses for downtown, specific dominant uses shall be assigned for the Core redevelopment areas. These shall be assigned within the framework of a multi-purpose use for most of the areas although in most cases a single use will be predominant. Possible changes in future market conditions may require some reconsideration of the specific uses currently foreseen for these Core redevelopment areas. The uses proposed generally conform to the office, retail, housing, motel-hotel and parking uses which are appropriate to the Core and are more specifically identified in each of the decisions set forth below . . . .

(4) Areas D, G, and I

the Race Street frontage rather than inside the garage at the northeast corner. The redeveloper agreed to this relocation and, in addition, agreed to the positioning of the first two stories of the garage 20 feet back from the Race Street right-of-way in order to create a public "mini-plaza" at the northwest corner of Fourth and Race Streets.

Pursuant to its contract with the City, Cincinnati Redevelopment Corporation submitted preliminary plans for the parking garage in February, 1966. The preliminary plans showed, as requested by the Urban Design Review Board, the scissor ramps on Fourth Street, the entrance ramp on Elm Street and the elevator tower at its new location on Race Street. These plans were approved by the City Manager and Urban Design Review Board as conforming to the Urban Renewal Plan.

On April 15, 1966, the City Planning Commission approved three street vacation ordinances which would permit the construction of the scissor ramps on Fourth Street, the entrance ramp on Elm Street, and the elevator tower on Race Street. Thereafter, on April 20, 1966, City Council passed the three ordinances, one of which vacated the north 12.5 feet of a 13.5 foot wide sidewalk on the north side of Fourth Street between Race Street on the east and Elm Street on the west. The purpose of the vacation ordinance was to facilitate the construction of entrance and exit ramps from a soon-to-be-widened Fourth Street. Additionally, the ordinances authorized the Mayor and City Manager to execute easements to the redeveloper for the ramps and elevator tower in exchange for easements from the redeveloper for pedestrian walkways through the related portions of Block D. These easements from the City to the redeveloper, and vice versa, were executed on July 1, 1966.

The City of Cincinnati did not give notice by publication of its intention to vacate a portion of the sidewalk

because, as found by the District Court and Court of Appeals in their opinions (Petitioners' Appendix, hereinafter cited as Appendix, at 13-14 and 82-85), the statutory law of Ohio did not require that notice be given.

The property for the garage was conveyed by the City to the redeveloper on July 1, 1966. Construction began soon after the conveyance and the garage was opened to the public on June 1, 1967. After purchasing the completed garage from Cincinnati Redevelopment Corporation for $4,000,000, Adcor Realty Corporation, a wholly owned subsidiary of Associated Dry Goods Corporation, conveyed the property to Morgan Guaranty Trust Company, with a leaseback to Associated Dry Goods Corporation. Morgan Guaranty Trust Company is the present owner of the garage.

Beginning in 1966, after the schematic and preliminary design plans for the garage had been approved by the City Manager and Urban Design Review Board, the Petitioners voiced objections to the location and design of the garage. Four meetings were held between Petitioners and one or more of the Respondents prior to commencement of construction of the garage. At these meetings numerous design changes were proposed by Respondents, including the installation of an additional bank of elevators on Fourth Street at Petitioners' cost. Petitioners summarily rejected all proposals.

After the transfer of the property to the redeveloper on July 1, 1966, Petitioners filed suit against the redeveloper and the City, later adding as defendants Respondent Associated Dry Goods Corporation, H & S Pogue Co., Inc., Adcor Realty Corporation, Morgan Guaranty Trust Co., the Regional Director of the Department of Housing and Urban Development, and the Secretary of the Department of Housing and Urban Development, the latter two of whom were voluntarily dismissed from the case. Petitioners claimed, *inter alia*, that the garage did not conform

to the Urban Renewal Plan, that the Urban Renewal Plan was improperly adopted by City Council, that they were not given an opportunity to be heard on the street vacation ordinance, that state and federal antitrust laws had been violated, and that they were deprived of due process of law and the equal protection of the law. Petitioners further alleged a conspiracy and fraud on the part of Respondents. The essence of Petitioners' case, as characterized by the Court of Appeals, is that "[t]hey do not like the design and location of the parking garage." Appendix at 2.

The parking garage itself, as observed by the Court of Appeals, Appendix at 1-2, is not a single-purpose garage designed primarily to serve Pogue's (Associated Dry Goods Corporation's) department store. Rather, the garage is open to the public twenty-four hours a day, seven days a week. It has a capacity of 1,200 cars, and serves people who are attending any other functions in the area. Moreover, it has an area of approximately 42,000 square feet on its first floor, devoted to retail and commercial purposes, 30,000 square feet of which is presently occupied by a retailer.

The District Court found that the garage violated the Urban Renewal Plan because it adversely affected the economic interests of Petitioners. Further, the District Court held that the violation of the Plan denied Petitioners due process and equal protection of the law. However, the District Court found in favor of the Respondents on the issues of improper adoption of the Urban Renewal Plan, the legality of the street vacation ordinances, and the state and federal antitrust violations.

The District Court entered a mandatory injunction against Respondents requiring them to alter the completed garage by installing two elevators at Fourth and Elm Streets and to make certain improvements to the fire tower on Fourth Street. The court also awarded Petitioners their costs, expenses and substantial attorneys' fees.

In reversing the District Court, the Court of Appeals for the Sixth Circuit not only held that Petitioners lacked standing to file their action, but also held that the City of Cincinnati and private Respondents cannot be held liable in this action. Further, the Court held that Petitioners were not entitled to notice of the vacation ordinances, and that Petitioners' antitrust claims are frivolous. The opinion of the Court of Appeals is reported at 480 F.2d 936 (6th Cir. 1973).

ARGUMENT

1. THE COURT OF APPEALS CORRECTLY RULED THAT PETITIONERS LACKED STANDING TO MAINTAIN THIS ACTION.

As noted by the Court of Appeals, the "threshold question" in this case is "whether persons located outside the Urban Renewal Area have standing to maintain this action." Appendix at 5. Petitioners have contended that they have standing on the following grounds:

1) As federal taxpayers;

2) Under the Administrative Procedure Act;

3) As persons having a personal stake in the outcome of the case; and

4) As private attorneys general.

The District Court ruled that Petitioners had standing as persons having a personal stake in the outcome of the case and as private attorneys general, and rejected Petitioners' claims of standing as federal taxpayers and under the Administrative Procedure Act. The Court of Appeals, however, held that Petitioners lacked standing under any of these theories.

Petitioners argue that the Court of Appeals improperly applied this Court's decisions in *Association of Data*

Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970). Respondents submit that the Court of Appeals correctly applied those decisions to the facts of this case.

In both *Data Processing* and *Barlow*, this Court held that the plaintiff's standing was determined by three tests:

1) The plaintiff must allege injury, economic or otherwise;

2) The interest sought to be protected by the plaintiff must be within the zone of interests sought to be protected by the statute or constitutional guaranty in question; and

3) Judicial review must not have been precluded.

Admittedly, Petitioners in this case have satisfied the first test by alleging damage to their businesses. However, as decided by the Court of Appeals, Petitioners have failed to satisfy the remaining two tests for standing.

Under the second test of *Data Processing* and *Barlow*, Petitioners in this case must show that their interests are within the zone of interests sought to be regulated or protected by the Urban Renewal Laws, 42 U.S.C. § 1441 *et seq.*, or the Fourteenth Amendment. Petitioners own or lease businesses outside a designated urban renewal area. They claim an economic injury which allegedly resulted from the demolition of the office buildings and businesses within the urban renewal area and the replacement of those structures with the parking garage. Petitioners have not cited any statutory provison which states, or even implies, that their economic interests, as businessmen outside an urban renewal area, are regulated or protected by the Urban Renewal Laws. In fact, no such provision exists because it was not the purpose of the Urban Renewal Laws to preserve the economic *status quo* of businesses either within or outside an urban renewal area. 42 U.S.C. § 1441.

In the absence of a statutory indication that Petitioners' economic interests are regulated or protected by the Urban Renewal Laws, it is apparent that Petitioners have failed to satisfy the second test of *Data Processing* and *Barlow*.

Additionally, Petitioners' alleged economic injury cannot be considered to be within the interests protected by the Fourteenth Amendment. Plaintiffs are not alleging state action which impairs a right protected by the Bill of Rights or a "fundamental right," e.g., the right to vote, *Baker v. Carr*, 369 U.S. 186 (1962); the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). Nor are they alleging state action which creates or fosters racial discrimination. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Duncan v. Louisiana*, 391 U.S. 145 (1968). The right asserted by Petitioners may be properly classified as "the right, possessed by every citizen, to require that the government be administered according to law . . . ." *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). That general right alone does not entitle a citizen to contest the constitutionality of actions by public officials. *Fairchild* at 129.

Under the "preclusion of judicial review" test, Petitioners argue that, although no statute granted them standing, "at the same time there is no statute preventing such judicial relief . . . ." Petitioners have ignored, however, this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954), which precluded judicial review of the legislative determination by the Congress, as the legislative body of the District of Columbia, to include certain property within an urban renewal area. Like the plaintiffs in *Berman*, Petitioners seek to substitute their judgment for the judgment of the legislative body of the City of Cincinnati.

As noted by the Court of Appeals, "[n]ot only was the project approved by HUD, but the Plan and the design and the location of the garage were specifically approved

by the City." Appendix at 6. City Council determined that the plans proposed by Respondent Cincinnati Redevelopment Corporation for the low-rate parking garage in Block D conformed to the Urban Renewal Plan. As a result, City Council passed an ordinance authorizing the sale of the land upon the condition that the garage be built as described by the plans.

Similar legislative determinations by local public authorities under the Urban Renewal Laws have been found to be precluded from judicial review. In *Woodland Market Realty Co. v. Cleveland*, 426 F.2d 955 (6th Cir. 1970), the Court of Appeals held that the determination of the boundary lines of an urban renewal project is a legislative function not subject to judicial review. The court in *Harrison-Halstead Community Group, Inc. v. H.H.F.A.*, 310 F.2d 99 (7th Cir. 1962), precluded judicial review of a determination by the local public authority to change the planned use of land already cleared of slums.

The foregoing case law dictates that courts must refrain from hearing cases in which the plaintiffs seek to substitute their judgment for that of a legislative body. The challenge by Petitioners to the legislative determination of the City Council of Cincinnati is no different from the challenges made to the legislative determinations discussed in the foregoing cases. Accordingly, Petitioners may not challenge City Council's determination that the proposed garage conformed to the Urban Renewal Plan.

Petitioners cite several cases supposedly in support of their argument that judicial review of the activities of the legislative body of the City of Cincinnati is not precluded in this case. However, all of the cited cases are inapposite. The only question involved in *Worthington v. Carskadon*, 18 Ohio St. 2d 222 (1969), was the validity of "quick take" eminent domain ordinances. There was no issue of standing in the case and no issue of whether judicial review of the controversy was precluded.

Investment Company Institute v. Camp, 401 U.S. 617 (1971), dealt with the issue of whether national banks could operate mutual funds and act as investment advisors to such funds. Applying the tests enunciated in *Data Processing*, which also dealt with the permissible scope of activities of national banks, this Court as in *Data Processing* held that the Congress did not intend to preclude judicial review of administrative rulings by the Comptroller of the Currency pursuant to the National Banking Act. Additionally, as in *Data Processing*, this Court held that Congress had arguably legislated against the competition the petitioners in *Investment Company* sought to challenge. Unlike the situation in *Investment Company* and *Data Processing*, however, this Court's decision in *Berman v. Parker* precludes Petitioners' challenging City Council's determination that the proposed garage conformed to the Urban Renewal Plan.

The decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972), as stated by the Court of Appeals (Appendix at 9), is against Petitioners since this Court held that the plaintiff and its members did not satisfy the "injury in fact" test of *Data Processing*, and hence lacked standing. Neither the "zone of interests" test nor the "preclusion of judicial review" test were considered by this Court in *Sierra Club*.

Judicial review under *Baker v. Carr*, 369 U.S. 186 (1962), was held not to be precluded for the reason that the petitioners had alleged a denial of equal protection under the Fourteenth Amendment due to disproportionate state legislative districts. This Court held that the case was justiciable and that a "political question" was not involved. Again, however, judicial review in this case, as discussed above, has been precluded by the decision of this Court in *Berman v. Parker*.

United States v. Causby, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), are clearly inapplicable in the present case. Both cases dealt with

whether plaintiffs' properties were taken within the meaning of the Fifth and Fourteenth Amendments by virtue of frequent flights of aircraft at low altitudes over such property. The question of standing was never raised or at issue. The only question was whether the overflights were such that an easement had been taken over plaintiffs' properties for which they must be paid just compensation as required by the Fifth and Fourteenth Amendments.

Petitioners argue that they are the only "logical" and "available" parties to challenge what occurred in Block D. This argument overlooks the fact that any property owner in Block D could have challenged the legality of the Urban Renewal Plan or the legality of the City's condemnation proceedings in respect to Block D. Just as significantly, the United States Department of Housing and Urban Development could have raised objections to the plans for the development of Block D on numerous occasions. Instead, the Department approved both the Urban Renewal Plan and the plans for the garage.

Moreover, as noted by the Court of Appeals, there is no "proof that any purchases made by the City were other than voluntary. The title of the purchaser may not be collaterally attacked here." Appendix at 11.

Petitioners rely upon *Richardson v. United States*, 465 F.2d 844 (3rd Cir. 1972) in support of their argument that they are the only logical parties to challenge the actions of the legislative body of the City of Cincinnati. Such reliance is misplaced. *Richardson* was an action by a taxpayer in mandamus to compel the United States Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency and to enjoin further publication of consolidated statements not specifically reflecting such Central Intelligence Agency receipts and expenditures. The taxpayer-plaintiff in the mandamus action relied on a specific constitutional limitation (to wit, Article I, section 9, clause 7 of the Constitution) on the

taxing and spending power of the Congress, in order to assert his standing under the holding of this Court in *Flast v. Cohen*, 392 U.S. 83 (1968). Petitioners in this case have failed to show a logical link between their taxpayer status and any legislative enactment attacked, contrary to what was shown by the plaintiff in *Richardson*. Furthermore, Petitioners have failed to show that the challenged activity of the Respondents exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power, as was also demonstrated by the plaintiff in *Richardson*.

2. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION ON STANDING DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

On pages 20 and 21 of their brief, Petitioners cite three cases for the proposition that plantiffs were granted standing even though no specific statute authorized judicial review. Petitioners' reliance on these cases is misplaced.

Springfield Television, Inc. v. Springfield, 462 F.2d 21 (8th Cir. 1972), involved an action against the City of Springfield by certain broadcasting companies seeking declaratory and injunctive relief from a special ordinance which granted a franchise for a community antenna television system. Applying the tests of the *Data Processing* and *Investment Company Institute* cases, the court found that plaintiffs alleged direct economic injury, and held that the Federal Communication Commission's regulations protected the "zone of interest" within which the plaintiffs' economic injury fell. In the present case, Petitioners have failed to show that their economic interests are within the zone of interests sought to be regulated by the Urban Renewal Laws, or any other statutory enactment or constitutional provision.

Plaintiffs in *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972), brought a class action under Rule 23 of the Federal Rules of Civil Procedure for enforcement of "grant agreements" made by the Federal Aviation Administration with the City of Los Angeles under the provisions of certain federal statutes. The Ninth Circuit found that these statutes were intended by Congress to insure the welfare of persons living near airports which were to receive government funds to engage in development projects. These statutes, the court held, clearly were designed to protect the interests of the plaintiffs. In the present case, however, Petitioners have shown no statute which was designed or in any way intended to protect their economic interest as businessmen outside an urban renewal area.

Similarly, *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Authority*, 465 F.2d 1272 (3rd Cir. 1972), is not supportive of Petitioners' argument. That case dealt with an action to enjoin collection of electric power charges pursuant to an increased electric power rate schedule. Although the applicable statute made no provision for judicial review of such rate increase, review was allowed because the Authority, in increasing such rates, ignored a statute requiring a public hearing at which interested persons could present their views and evidence in support thereof. Furthermore, the court found that the interest sought to be protected by the plaintiffs was within the zone of interests sought to be protected under the applicable statute governing the Authority. Again, Petitioners in the present case have failed the zone of interest tests enunciated by this Court.

Rather than being in conflict with decisions of other Courts of Appeals, the Sixth Circuit's decision in the present case is consistent not only with its prior decisions but the decisions of other circuits as well. A case is not

justiciable when plaintiffs fail to prove injury to a legal interest. As discussed by the Court of Appeals in the present case (Appendix at 13), Petitioners must establish that the right claimed to have been invaded is a "legal right – one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118 (1939). Petitioners have established no such rights. Rather, Petitioners claim economic injury caused by the demolition of buildings and the construction of a garage in a nearby urban renewal area. However, under the holdings of this Court and the Courts of Appeals, the law is clear that one has not sustained an injury to a protectable legal interest when he loses customers as a result of a government financed project located nearby. *Tennessee Electric Power Co. v. T.V.A., supra; Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Barry v. H.H.F.A.*, 340 F.2d 939 (2d Cir. 1965); *Taft Hotel Corp. v. H.H.F.A.*, 262 F.2d 307 (2d Cir. 1958); *Woodland Market Realty Co. v. Cleveland*, 426 F.2d 955 (6th Cir. 1970). As characterized by the Court of Appeals, "[w]hatever damages [Petitioners] sustained as a result of the Urban Renewal Project are *damnum absque injuria.*" Appendix at 13.

3. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE OF NOTICE OF VACATION IN ACCORDANCE WITH THE APPLICABLE LAW OF THE STATE OF OHIO.

Petitioners have claimed that passage of an ordinance by City Council vacating a portion of the north side of Fourth Street, without formal notice, violated Petitioners' rights under the Fifth and Fourteenth Amendments. However, both the District Court (Appendix at 84-85) and the

Court of Appeals (Appendix at 13-14) correctly decided that Petitioners were not entitled to notice.

The purpose of the vacation ordinance was to facilitate construction of entrance and exit ramps into the proposed garage from a soon-to-be-widened Fourth Street. The vacated strip of land constituted merely the north 12.5 feet of the north sidewalk which was 13.5 feet in width. Subsequent to passage of the vacation ordinance, Fourth Street was widened from four lanes of one-way traffic, 39.5 feet in width, to five lanes of one-way traffic, 53 feet in width, with ramps for the garage exiting off and entering on the additional or fifth lane.

Section 723.06, Ohio Revised Code, mistakenly cited by Petitioners as § 723.09, does not require notice "when the owners of property abutting the part of the street or alley proposed to be vacated" file their written consent. The part of the street vacated was the north portion of the sidewalk on the north side of Fourth Street. Although some of the Petitioners own properties abutting the south side of Fourth Street, none of the Petitioners owned any properties abutting the vacated north sidewalk. The only property which abutted the vacated sidewalk was the property in Block D, which was owned in its entirety at the time of the passage of the ordinance by the City of Cincinnati. Since the City, as the only owner of property which abutted the vacated sidewalk, consented to the vacation, §723.06 was applicable and notice by publication was not required.

Moreover, the claim that Petitioners were entitled to notice is moot unless Petitioners can show that they have a right to compensation for the vacated sidewalk. It is well settled in Ohio law that a property owner whose property abuts a street, a portion of which is vacated, is entitled to compensation only in the event that the vaca-

tion destroys or substantially interferes with the owner's access to his property. *See State ex rel. Schiederer v. Preston*, 170 Ohio St. 542 (1960); *New Way Family Laundry, Inc. v. Toledo*, 171 Ohio St. 242 (1960); and *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97 (1955). No evidence was introduced in the present case showing even the slightest interference with access to Petitioners' properties. To the contrary, however, the evidence showed that the street in front of Petitioners' properties was widened, with the result that the access was probably improved.

In support of their argument, Petitioners cite three cases, none of which, however, supports Petitioners' argument. In the first case, *State ex rel. McKay v. Kauer*, 156 Ohio St. 347 (1951), the Supreme Court of Ohio held that the plaintiff was entitled to compensation because access to his property had been destroyed. In the present case access to Petitioners' property was in no way affected.

Petitioners' reliance upon their second cited case, *Cincinnati v. Batsche*, 52 Ohio St. 324 (1895), is also misplaced. The issue in *Batsche* was the proper interpretation of a pre-1895 state statute regarding a special assessment on a front foot basis of abutting property for purposes of financing construction of a street where no street had previously existed. In the present case, neither the language of this pre-1895 statute nor a special assessment is at issue.

Petitioners' final case is *Fry v. O'Leary*, 141 Wash. 465 (1927). In *Fry*, the City of Olympia, Washington, vacated a portion of a street situated on the other side of the center line of the part of the street to which plaintiff's property abutted. The court held, consistent with Ohio law, that plaintiff was entitled to compensation only if plaintiff could prove that access to his property was "materially diminished." 141 Wash. at 470.

4. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE CITY OF CINCINNATI COULD NOT BE LIABLE TO PETITIONERS UNDER 42 U.S.C. § 1983, AND THAT THE CITY WAS ENGAGED IN A GOVERNMENTAL FUNCTION.

The liability of Respondents for a violation of Petitioners' rights under the Fourteenth Amendment was imposed by the District Court under 42 U.S.C. § 1983. Appendix at 55. However, a municipal corporation is not a "person" within the meaning of the Civil Rights Act. *City of Kenosha v. Bruno*, ... U.S. ..... , 37 L. Ed. 2d 109 (1973); *Monroe v. Pape*, 365 U. S. 167 (1961); *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971).

Additionally, a municipality's execution of an urban renewal project is the performance of a governmental function, and a municipality's voluntary election to contract with the federal government to undertake a project does not make the function proprietary, thereby depriving it of the defense of sovereign immunity. *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio 1967). *Sayre* involved a suit against the City of Cleveland and the United States for negligence in permitting blight to spread throughout an urban renewal project area in which the plaintiff owned properties. The city raised the defense of sovereign immunity. The plaintiff, as do Petitioners in this case, argued that the city's voluntary election to undertake the project made its conduct private and proprietary under the test set forth in *Wooster v. Arbenz*, 116 Ohio St. 281, 284 (1927). However, the court in *Sayre* held that the city's voluntary election did not make its function in the urban renewal project proprietary.

> Just because Cleveland voluntarily elected to contract with the Federal Government to undertake an urban renewal project cannot serve to make that project a

> "private and proprietary function." If that were so every federal aid program voluntarily undertaken by state, county, or municipal governments—interstate highway systems, county welfare programs, local anti-poverty programs, to cite some better known examples —by the alchemy of the *Arbenz* test ("and the city has an election whether to do or omit to do those acts") would be transformed from a government to a proprietary function. The *Arbenz* test of whether a municipal function is governmental or proprietary is undependable and outdated. It is here found to be inapplicable. [282 F. Supp. at 180]

As in *Sayre*, the function of the City of Cincinnati under its urban renewal program was to adopt the Urban Renewal Plan, and to declare Block D and other areas included in the Plan as slums and blighted areas, all in furtherance of the health and safety of the citizens of Cincinnati. The function of the redeveloper, Cincinnati Redevelopment Corporation, was to purchase and redevelop Block D by constructing on part of D a low-rate parking garage for use of the community. The function of Associated Dry Goods Corporation, through its H & S Pogue Co. division, is to maintain the garage. Clearly the City of Cincinnati's conduct was not for the City's corporate benefit or profit.

Moreover, Ohio has long recognized that elimination of slums and blighted areas involves a public purpose for which public funds can be expended and the power of eminent domain exercised. *See State ex rel. Bruestle v. Rich*, 159 Ohio St. 13 (1952).

Accordingly, the City of Cincinnati, as determined by the Court of Appeals in this case (Appendix at 14), was engaged in the performance of a governmental function and cannot, therefore, be held liable for performance of such acts.

5. THE COURT OF APPEALS IN NO WAY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The opinion of the Court of Appeals is both candid and honest in assessing the merits of Petitioners' claim. Petitioners did in fact charge Respondents with "everything else they could think of...." Appendix at 3. Petitioners filed not only their original complaint, but three additional complaints as well. In addition to their urban renewal and civil rights causes of action, Petitioners charged Respondents with conspiracy, fraud, violation of state and federal antitrust laws, violation of state law notice provisions in connection with vacation ordinances, and deprivation without compensation of Petitioners' easements of air, light and view. Not only did the Court of Appeals frankly state that Petitioners charged Respondents with everything that they could think of, but the District Court also found no merit in many of these contentions, some of which seemed to the District Court to be "overstated." Appendix at 31-33 and 77-85.

Petitioners also criticize the Court of Appeals for failing to hold the District Court's findings of fact as "clearly erroneous." However, the Court of Appeals never reached the point where it was necessary to set aside the District Court's findings of fact. The "threshold question" before the Court of Appeals was "whether persons located outside the Urban Renewal area have standing to maintain this action." Appendix at 5. After determining as a matter of law that the Petitioners had no such standing, the Court of Appeals reversed the District Court on this threshold question with instructions to dismiss the complaint, without any necessity of reviewing and setting aside any findings of fact set forth by the District Court.

CONCLUSION

The basic purpose of the federal Urban Renewal Laws (42 U.S.C. section 1441 *et seq.*) and the many local programs pursuant thereto was to establish the means whereby our cities could be renewed and reestablished. To accomplish this noble and necessary goal, these laws and these programs sought to employ the capital and construction know-how of private persons and organizations. Accordingly, it was provided by law that the cities, acting as urban renewal agencies, could condemn deteriorated properties, raze them, and convey the cleared properties to private redevelopers. As discussed above, the redevelopers are obligated to redevelop the property in accordance with the construction plans approved by the local urban renewal agency and the Department of Housing and Urban Development. Once the project is completed, the redevelopers may retain or sell the property as long as the convenants in the deed from the local agency are observed. The uses to which the project might be devoted include totally private uses. 42 U.S.C. § 1441 (1), (2). What Petitioners fail to realize, as demonstrated in their Petition, is that, under Urban Renewal, private property may be condemned and sold to private interests who then must redevelop the property in accordance with the Urban Renewal Plan.

The gravamen of Petitioners' complaint, as summarized by the Court of Appeals, is that "they did not receive the benefits from the Urban Renewal project which they expected." Appendix at 14. Further, Petitioners "do not like the design and location of the garage." Appendix at 2. For the reasons discussed in its opinion, the Court of Appeals denied Petitioners, as businessmen located outside the urban renewal area, standing to maintain their action. There are sound policy reasons underlying the Court of Appeals' decision. The means to the fulfillment

of the goal of the Urban Renewal Laws and programs is the utilization of the capital and know-how of private organizations. If the decision of the District Court was allowed to stand, the goal of urban renewal would never be reached. If persons outside an urban renewal area, seeking to protect their own economic interests, are allowed to delay urban renewal programs until a concensus is reached among the city, the redeveloper and themselves on the design of urban renewal projects, then few projects would ever become reality. Moreover, few developers would be interested in bidding on urban renewal projects because of the likelihood of suit by special interests groups demanding that the project, once constructed, be torn down or remodeled and that the redeveloper and owner or lessee of the project pay the substantial attorneys' fees and costs of the special interest group.

Furthermore, contrary to Petitioners' claims, the Urban Renewal Plan for the City of Cincinnati was never violated nor changed by Respondents. The Plan called for a predominant use of parking within Block D, which is, in fact, the use to which a portion of Block D is now devoted.

Petitioners also imply that the Court of Appeals' decision would foreclose all judicial review of urban renewal programs. Any such implication, however, is without merit. The Court of Appeals held that businessmen, located outside an urban renewal area, do not have standing to raise objections as to the design and location of a garage built pursuant to the Urban Renewal Plan, and that they cannot contest the determination by the legislative body of the City of Cincinnati that construction plans submitted by a redeveloper are in accordance with the urban renewal plan. Petitioners cannot substitute their judgment for the judgment of the legislative body. As discussed herein, this decision of the Court of Appeals is consonant with decisions of this Court, and is not in conflict with decisions of other Courts of Appeals.

Furthermore, the Sixth Circuit of Appeals has not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Rather, the Court of Appeals applied the relevant case and statutory law to the facts of this case and decided in favor of Respondents.

Accordingly, for the reasons stated above, Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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